(25,270)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 987.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS, PLAINTIFF IN ERROR,

vs.

CHARLES Q. HILDEBRANDT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 1, 1916.

1 UNITED STATES OF AMERICA,
Supreme Court of Ohio, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the Seal of said Supreme Court of Ohio this 27th day of April A. D. 1916.

[Seal The Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

2 No. 15160.

In the Supreme Court of Ohio. In Mandamus.

STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, Plaintiff,

v.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

And now comes the State of Ohio on the relation of David Davis, a citizen and resident of the United States and of Hamilton County, State of Ohio, and said relator alleges that he is more than twenty-one years of age, a citizen and resident of the United States and of the State of Ohio, and an elector of the State of Ohio, and of Hamilton County in said State of Ohio, and also of the First Congressional District of Ohio, and as such elector, citizen and resident as aforesaid he is entitled to vote at all regular elections held under the laws of Ohio in said County and District, and he is beneficially interested as such citizen and elector in the choice and election in the year 1916 and future years, of Representatives in the Congress of the United States and of the committeemen, delegates and alternates particularly specified and required to be chosen by the laws of Ohio in and for said State, District and County, more particularly mentioned in the original Petition in this case filed in this Court, February 15, 1916, to which reference is made.

That the defendant, Charles Q. Hildebrant is the duly elected, qualified and now acting Secretary of State for the State of Ohio, and by virtue of said office he is the State Supervisor and Inspector of Elections and State Supervisor of Elections, and it is his duty by the laws of Ohio, to control, supervise and direct the
3 several Deputy State Supervisors and Inspectors of Elections and the Board constituted by them, and to join and participate with them in the discharge of their duties, in the manner in which all elections in Ohio are required to be held.

That Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrant and Thomas J. Noctor, are the duly appointed and qualified Deputy State Supervisors and Inspectors of Elections, for the said County of Hamilton, in the State of Ohio, and compose in said County the Board of Deputy State Supervisors and Inspectors of Elections, and are now acting as such, and it is their duty by virtue of the laws of Ohio, to supervise, control, direct and provide for all elections required to be held by the laws of Ohio, in the year 1916, in the County of Hamilton, State of Ohio, including the duty of printing and furnishing the necessary ballots, poll books and tally sheets required in each voting precinct in said County for Presidential, Congressional, State, County, Township, District, Municipal or other elections.

That the Legislature of Ohio, acting under and by virtue of the authority given by Article I, Section 4, of the Constitution of the United States, and to provide for carrying out and executing other provisions of the Constitution of the United States relating to and authorizing the districting of Ohio, for the election of Representatives in the Congress of the United States, also to prescribe the manner of their election, and for the appointment in each State of the United States of electors in the manner the Legislature of the States may direct, as authorized Article I, Section I, of the Constitution of the United States, and also as authorized and required by law and especially as authorized and required by Section 3 of an "Act for the appointment of Representatives in the Congress among the several States under the Thirteenth Census," passed by Congress and approved, August 8, 1911, and as required by Section 2, Article XIV, of the Constitution of the United States (amendment), on May 27, 1915, passed an Act, which was approved by Frank B. Willis, Governor, June 2, 1915, and filed by him in the office of the Secretary of State at Columbus, Ohio, on June 4, 1915, making a districting and an apportionment of the State of Ohio into twenty-two Congressional districts, under the Thirteenth Census of the United States, being entitled, "An Act to Amend Section 4828—1 of the General Code, making an Apportionment of the State of Ohio, into twenty-two Congressional districts under the Thirteenth Census of the United States," published in Vol. 106 Ohio Laws, page 474.

That under said Act of May 27, 1915, the twenty-two Representative Congressional districts apportioned to Ohio, including said First District, were each other and different from those provided for in a prior act, passed by the Legislature of Ohio, April 28, 1913,

and otherwise differing as stated in the original petition, filed as aforesaid.

That pretending to act under the Constitution of Ohio, Section 1*c*, Article II, the said Act of May 27, 1915 was submitted to a vote of the people at the November election of 1915 of said State, by which vote the same was rejected as particularly set forth in said original Petition, to which reference is here made.

4 That by reason of such rejecting vote, said defendants and each of them, as stated in said original Petition, to which reference is also here made for fuller description, have refused as in said Petition set forth to severally perform their duties under said last named Act, and especially those defined more particularly in said Petition whereby the plaintiff has and will be injured as in said Petition set forth.

It was adjudged on the final hearing in this case in the Supreme Court of Ohio, among other things, that said original Petition did not state a cause of action in mandamus against defendants; or either of them, that the Constitution and laws of Ohio gave the right to the people of the State of Ohio to reject and annul the said May 27, 1915 Act, and thereby to leave said April 28, 1913 Act in full force and effect, notwithstanding the provision of Section 4, Article I, and other provisions of the Constitution and laws of the United States; and the Supreme Court of Ohio also adjudged that the original Petition in this case be, and the same was, dismissed at the costs of the relator, all of which will more fully and particularly appear by the pleadings and record in said case.

Your petitioner, therefore, respectfully shows that in the above entitled action in the Supreme Court of Ohio, the highest court in the State of Ohio in which a decision in said action could be had, there was drawn in question, the validity of Statutes of the State of Ohio and provisions of the Constitution of the State of Ohio on the ground of their repugnancy and their being in conflict with the Constitution of the United States and laws thereof; the said decision of said Supreme Court of Ohio being in favor of the validity and application in the premises of said Constitution and laws of Ohio, and against the rights and interests claimed and alleged by the State of Ohio and said relator and other similarly situated electors of said State.

5 The said final decision of said Court so against plaintiff necessarily involved and said Federal questions necessarily arose and were considered in rendering said final judgment; and your Petitioner being greatly damaged by such decision, is entitled to have the same reviewed and reversed by the Supreme Court of the United States.

Wherefore your Petitioner prays that a Writ of Error to said Supreme Court of Ohio be allowed; that citation be granted and signed; that bond herewith presented be approved, and that upon compliance with the terms of the Statute in such case made and provided, said bond and Writ of Error may operate as the law and rules of Court may provide, that the errors complained of may be reviewed in the Supreme Court of the United States, and the judgment aforesaid of said Supreme Court of the State of Ohio may

be reversed; that upon the final hearing of this cause a Writ of Mandamus may issue as prayed for; and for all other proper orders and relief.

KEIFER AND KEIFER AND
SHERMAN T. McPHERSON,
Attorneys for Petitioner.

STATE OF OHIO,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by plaintiff in the sum of Two Hundred Dollars.

HUGH L. NICHOLS,
Chief Justice of Supreme Court of Ohio.

April 27, 1916.

6 [Endorsed:] No. 15160. Supreme Court of Ohio. State of Ohio, ex rel. David Davis, &c., Plaintiff, v. C. Q. Hildebrant, Secretary of State, et al., Defendants. Petition for Writ of Error. Keifer & Keifer and Sherman T. McPherson, Attorneys for Plaintiff. Filed Apr. 27, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

7 No. 15160.

The Supreme Court of the State of Ohio.

STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, Plaintiff,

v.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Assignment of Errors and Prayer for Reversal.

The State of Ohio on relation of David Davis, in connection with the Petition for a Writ of Error herein, makes the following assignment of errors which are claimed to be manifest in the Record (to which reference is made herein) and the final judgment of the Supreme Court of the State of Ohio in the above entitled action, and upon which it relies for a reversal of said judgment and for this court's orders granting the relief prayed for.

First. The Supreme Court of Ohio erred in sustaining the demurrer to the Petition and in dismissing it at the costs of the plaintiff.

Second. The Supreme Court of Ohio erred in finding and adjudging that the so-called referendum provided for by Article II, Constitution of Ohio, was and is a part of the legislature of the

State of Ohio and applicable to prevent it from prescribing
8 the times, places and manner of electing Representatives to the Congress.

Third. The Supreme Court of Ohio erred in finding and adjudging the said Act of May 27, 1915 was and is not a valid and existing law prescribing the times, places and manner of holding elections in Ohio for Representatives in the Congress.

Fourth. The Supreme Court of Ohio erred in finding, holding and adjudging that said Act of May 27, 1915 was rendered invalid by reason of a referendum vote against the same, taken at the November election in Ohio in 1915.

Fifth. The Supreme Court of Ohio erred in finding and regarding the so-called referendum provisions in Section 1*c*, Article II of the Constitution of Ohio as valid and applicable to prevent the said Act of May 27, 1915 of the legislature of Ohio from going into and remaining in full effect to prescribe the times, places and manner of electing Representatives to the Congress, as provided in Section 16, Article II, Constitution of Ohio, and as required by the Constitution of the United States, Section 4, Article I; and for the reasons among others, that if said referendum provision is applicable, and valid, it would operate to deprive said legislature of the right, under said Section 4 of the Constitution of the United States (*a*) to enact any law, thus prescribing, within ninety days of any regular election in Ohio for Representatives in the Congress which could go into effect at or prior to such election, and (*b*) to enact any law, thus prescribing, within one year and one hundred and fifty (150) days prior to such election which could be prevented from going into effect at or prior to such election provided six per centum of the votes cast for Governor at the last preceding election, filed a petition as provided in Section 1*c* and 1*g*, Article II, Constitution of Ohio.

Sixth. The Supreme Court of Ohio erred in holding and
9 adjudging Section 1*c*, Article II and other so-called referendum provisions of the Constitution of Ohio were applicable to reject and did reject the said Act of the legislature of Ohio, passed May 27, 1915, and prevented it from going into and being in effect as provided in Section 16, Article II of the Constitution of Ohio and as required by the Constitution of the United States.

Seventh. The Supreme Court of Ohio erred in holding and adjudging the so-called referendum provisions found in Article II of the Constitution of Ohio to be republican in form and valid to deprive the legislature of Ohio, by petition, or a vote of the electors of said State, from its exclusive right to prescribe the times, places and manner of electing Representatives from Ohio to the Congress, and, consequently, to reject said Act of May 27, 1915.

Eighth. The Supreme Court of Ohio erred in finding and adjudging that the apportionment Act of Congress of August 8, 1911, gave to the people of Ohio power or right by a referendum vote, to reject and render invalid the said Act of May 27, 1915.

Ninth. The Supreme Court of Ohio erred in holding that Congress, by the apportionment Act of August 8, 1911, granted the right to recognize as lawful Congressional districts "enacted in the

manner provided by the laws of those States employing the Constitutional referendum."

Tenth. The Supreme Court of Ohio erred in rendering a judgment against the plaintiff, and in not rendering a judgment for the plaintiff as petitioned and prayed for.

Wherefore the plaintiff in error, the State of Ohio on the relation of David Davis, prays that the decision and judgment of the Supreme Court of Ohio may be reversed and held for naught; that the prayer of the petition in the Supreme Court of Ohio and in said writ of error may be granted, and especially that a peremptory writ of mandamus may be adjudged, ordered and issued as prayed for, and that plaintiff may be restored to all things it has lost be reason of said decision and judgment, and for all proper relief.

KEIFER AND KEIFER &
SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

[Endorsed:] No. 15160. Supreme Court of Ohio. State of Ohio, ex rel., David Davis, &c., Plaintiff, v. C. Q. Hildebrant, Secretary of State, et al., Defendants. Assignment of Errors. Keifer & Keifer and Sherman T. McPherson, Attorneys for Plaintiff. Filed Apr. 27, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the Honorable the Judges of the Supreme Court of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of Ohio before you, or some of you, between The State of Ohio on relation of David Davis, a citizen and resident of the United States and of Hamilton County, State of Ohio, plaintiff, and Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants, a manifest error hath happened, to the great damage of the said plaintiff, The State of Ohio on relation of David Davis, a citizen and resident of the United States and of Hamilton County, State of Ohio, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the

same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 27th day of April, in the year of our Lord one thousand nine hundred and sixteen.

[Seal United States District Court, Ohio.]

B. E. DILLEY,
Clerk of the District Court of the United States, Southern District of Ohio.
By HARRY F. RABE, *Deputy.*

Writ of Error allowed upon the execution of a bond in the sum of $200.00 this 27th day of April, 1916.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

[Endorsed:] Filed April 27, 1916. Supreme Court of Ohio, Frank E. McKean, Clerk.

13 *Citation.*

UNITED STATES OF AMERICA, *ss:*

Supreme Court of the United States to Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray H. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of Ohio, wherein The State of Ohio on relation of David Davis, a citizen and resident of the United States and of Hamilton County, State of Ohio, is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Hugh L. Nichols, Chief Justice of the Supreme Court of Ohio, this 27th day of April, in the year of our Lord one thousand nine hundred and sixteen.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

14 Service of the within Citation is hereby acknowledged, appearance entered and waiver as to time of hearing on behalf of defendants in error this 24th day of April, 1916.

ROBERT Z. BUCHWALTER,
WILLIAM J. McDEVITT,
RAY H. HILDEBRAND, AND
THOMAS J. NOCTOR,
Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio,
By SMITH H. HICKENLOOPER,
Asst. Prosec. Att'y for Ham. Co., O.
CHARLES Q. HILDEBRANT,
Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections.
By EDWARD C. TURNER,
Attorney General of Ohio, Attorney for Defendants.

15 [Endorsed:] No. —. Supreme Court of the United States. State of Ohio on Relation of David Davis, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, Plaintiff in Error, v. Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants in Error. Citation. Service is acknowledged, Appearance entered, and Waiver of time of hearing by Defendants. Filed April 27, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

16 *Bond.*

Know all men by these presents, That we, David Davis, as Principal, and — as sureties, are held and firmly bound unto Charles Q. Hildebrant, Secretary of the State of Ohio; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, State Supervisors and Inspectors of Elections for Hamilton County, Ohio, in the full and just sum of Two Hundred Dollars, to be paid to the said Charles Q. Hildebrant, Secretary of State of Ohio, Robert Z. Buchwalter, William J. McDevitt, Roy J. Hildebrand, and Thomas J. Noctor, Deputy Supervisors and Inspectors of Elections, Hamilton County, Ohio, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this — day of April, in the year of our Lord one thousand nine hundred and sixteen.

Whereas, lately at a regular term of the Supreme Court of Ohio, at Columbus, Ohio, in a suit depending in said Court, between The State of Ohio, on relation of David Davis, plaintiff, and Charles Q.

Hildebrant, Secretary of State of Ohio, Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand, and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, was defendant, a judgment was rendered against the said plaintiff, The State of Ohio, on relation of David Davis, and the said plaintiff, The State of Ohio on relation of David Davis, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said above named defendants citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said plaintiff, The State of Ohio, on relation of David Davis, shall prosecute the writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

17 DAVID DAVIS. [SEAL.]
CHAS. F. MALSBARY. [SEAL.]

S-aled and delivered in presence of:

SHERMAN T. McPHERSON.
W. M. COFFIN.

Approved by:

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

April 27, 1916.

In the Supreme Court of the State of Ohio, January Term, 1916.

No. 15160.

Attorneys.	Title of Case.	Action.	Fees & Costs.	Paid by.
Keifer & Keifer, Springfield. Sherman T. McPherson, Cincinnati.	The State of Ohio on relation of David Davis, a citizen and resident of the United States and of Hamilton County, Ohio,		Petition, $5.00. Final Record, $3.00.	Sherman T. McPherson.
	v.			
Edward C. Turner, Attorney Gen'l. T. S. Hogan, James E. Campbell, Columbus. E. H. Moore, Youngstown. J. V. Campbell, Cincinnati. A. G. Turnipseed, West Union.	Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections, and State Supervisor of Elections; Robert J. Buchwalter, William J. McDevitt, Ray J. Hildebrant, and Thomas J. Noccor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio.	Petition in Mandamus.	Transcript, $5.00.	J. Warren Keifer. J. Warren Keifer.

Memoranda of Pleadings, etc., Filed, Writs Issued, etc., Judgments, Orders, and Decrees.

Transcript of Docket Entries.

Date. 1916.	
Feb. 15th.	Petition in Mandamus filed.
" 24th.	Demurrer to Petition of Defendant, Hildebrant, Secretary of State, etc., filed.
" 24th.	Answer to Petition of State Supervisors and Inspectors of Elections of Hamilton County, Ohio, filed.
" 25th.	Plaintiff's printed brief filed.
" 25th.	Six printed copies of Petition filed.
" 25th.	Seven typewritten copies of defendant's brief filed.
Mch. 2nd.	Plaintiff's printed reply brief filed.
Ap'l 27th.	Petition for Writ of Error, Order Allowing Writ, Assignment of Errors, Writ of Error, Bond in sum of $200.00, signed by David Davis, and Charles F. Malsbary, Citation and Acknowledgment of Service thereof by defendants, and certified copy of Opinion filed.
1916.	
April 18.	Writ Denied. Opinion. J. 27-274.
April 27.	Entry allowing writ of error and certifying Federal question. J. 27—.
April 27.	Entry approving bond. J. 27—.

THIS PAGE BOUND VERTICAL IN BOOK

19 No. 15160.

Transcript of Journal Entries.

April 18, 1916—This cause came on for final hearing on the 26th day of February, A. D. 1916, it having theretofore been, by consent of parties, on application of the petitioner, by this court, set down and ordered to be heard on that day on the merits and for final decree on the demurrer of said C. Q. Hildebrant, Secretary of State, etc., and the answer of said other defendants, all parties also consenting to such hearing without the issuing of an alternative writ of mandamus, the same being by them waived, and the cause was accordingly submitted to this court on the said petition, demurrer and answer, and was argued by counsel, on consideration whereof the court finds that said demurrer should be sustained for the reason that the said Act of the Legislature of Ohio, passed May 27, 1915, is not a valid and subsisting law of the State of Ohio in consequence of the referendum vote of the people of Ohio at the November election in Ohio in 1915, and for which reason the said petition did not state facts sufficient in law to entitle the plaintiff to the relief prayed for in its petition; it is therefore ordered and adjudged that said petition and this action be dismissed.

And it is further ordered that the defendants recover of plaintiff their costs herein, taxed at $—, to each and all of which findings, orders and judgments of this court the plaintiff by its counsel excepts.

20 Supreme Court of Ohio.

STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, plaintiff,

vs.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Entry.

Now comes the plaintiff, the State of Ohio on relation of David Davis, and tenders bond in the sum of $200.00 as provided in the order allowing Writ of Error, and the same is hereby approved and ordered filed.

HUGH L. NICHOLS,
Chief Justice of the Supreme Court of Ohio.

April 27, 1916.

[Endorsed:] Filed Apr. 27, 1916. Supreme Court of Ohio. Frank E. McKean, Clerk.

21 Supreme Court of Ohio.

STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, plaintiff,

vs.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Entry.

On this day came the plaintiff, The State of Ohio on Relation of David Davis, by his attorneys herein, and present to the Court their petition praying for the allowance of a Writ of Error from the Supreme Court of the United States, and filed therewith their assignments of error.

Which said Writ of Error is allowed and said plaintiff is ordered to give bond to cover the costs in this action in the amount of Two hundred dollars ($200.00).

I certify that a federal question was made in this case, viz: Whether a referendum under the Constitution of Ohio, Article 2, Section 1c, can be had of the Act of the Legislature of the State of Ohio, passed May 27, 1915, making an apportionment of the State of Ohio into twenty-two congressional districts under the thirteenth census of the United States, as authorized by Article I, Section 4, of the Constitution of the United States.

[Endorsed:] Entry. Hugh L. Nichols, Chief Justice. Filed Apr. 27, 1916. Supreme Court of Ohio. Frank McKean, Clerk.

22 No. 15160.

In the Supreme Court of Ohio.

STATE OF OHIO, ex Rel., DAVID DAVIS, Etc., Etc., Plaintiff,

vs.

C. Q. HILDEBRANDT, Secretary of State et al., Defendants.

Petition in Mandamus.

Filed February 15, 1916.

Keifer & Keifer, Sherman T. McPherson, Attorneys for Plaintiff.

23 In the Supreme Court of Ohio.

No. 15160.

STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, plaintiff,

vs.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Petition.

Your petitioner represents that he is more than twenty-one years of age, a citizen of the United States and an elector of the State of Ohio, and now is and for more than the year last past has been a resident of the City of Norwood, Hamilton County, Ohio, and of the First Congressional District of Ohio, and as such elector, citizen and resident as aforesaid, he is entitled to vote at all regular
24 elections held under the laws of Ohio, and he is beneficially interested in the choice and election in the year 1916 and future years, of Representatives in the Congress of the United States and of the committeemen, delegates and alternates particularly hereinafter mentioned and referred to.

That Charles Q. Hildebrandt is the duly elected qualified and now acting Secretary of State for the State of Ohio, and by virtue of said office he is the State Supervisor and Inspector of Elections and State Supervisor of Elections, and it is his duty by the laws of Ohio to control, supervise and direct the several Deputy State Supervisors and Inspectors of Elections and the Board constituted by them, and to join and participate with them in the discharge of their duties, in the manner in which all elections in Ohio are required to be held.

That Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, are the duly appointed and qualified Deputy State Supervisors and Inspectors of Elections, for the said County of Hamilton, in the State of Ohio, and compose in said county. The Board of Deputy State Supervisors and Inspectors of Elections, and are now acting as such, and it is their duty by virtue of the laws of Ohio to supervise, control, direct and provide for all elections required to be held by the laws of Ohio, in the year 1916, in the County of Hamilton, State of Ohio, including the duty of printing and furnishing the necessary ballots, poll books and tally sheets required in each voting precinct in said County for Presidential, Congressional, State, County, Township, District, Municipal or other elections.

That the legislature of Ohio, acting under and by virtue of the au-

thority given by Article I, Section 4, of the Constitution of
25 the United States, and to provide for carrying out and executing other provisions of the Constitution of the United States relating to and authorizing the districting of Ohio, for the election of Representative in the Congress of the United States, also to prescribe the manner of their election, and for the appointment in each State of the United States of electors in the manner the Legislature of the States may direct as authorized by Article I, Section 1, of the Constitution of the United States, and also as authorized and required by law and especially as authorized and required by Section 3 of an "Act for the apportionment of Representatives in the Congress among the several States under the Thirteenth Census" passed by Congress and approved, August 8, 1911, and as required by Section 2, Article XIV, of the Constitution of the United States (amendment), on May 27, 1915, passed an act, which was approved by Frank B. Willis, Governor, June 2, 1915, and filed by him in the office of the Secretary of State, at Columbus, Ohio, on June 4, 1915, making a districting and an apportionment of the State of Ohio into twenty-two congressional districts, under the Thirteenth Census of the United States, being entitled, "An Act to Amend Section 4828-1 of the General Code, making an Apportionment of the State of Ohio, into twenty-two congressional districts under the Thirteenth Census of the United States," published in Volume 106 Ohio Laws, page 474.

That under said Act, the said twenty-two congressional districts and their boundaries were particularly and definitely described, the First District being described as follows, viz:

"First District—that so much of the County of Hamilton, as is now contained within the limits of Wards, 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 13, 25; all of the City of Norwood, Columbus and Mill-
26 creek Townships, all of the City of St. Bernard within Millcreek Township and the Townships of Anderson, Columbia, Sycamore and Symmes, shall compose the First District."

The districting Act, Section 4828-1 of the General Code, passed by the Legislature of Ohio, April 28, 1913, and approved May 6, 1913, by James M. Cox, Governor, and found in 103 Ohio Laws, page 568, was repealed and superseded by the aforesaid Act of 1915. Under said Act of April 28, 1913, the State of Ohio was divided into twenty-two congressional districts, the boundaries of each district being particularly and definitely defined but differently in each instance, from those defined under said Act of May 27, 1915. And in the said Act of April 28, 1913, the First District of Ohio, was described and founded as follows:

"First District—that so much of the County of Hamilton, as is now contained within the limits of Wards, 1, 2, 3, 4, 5, 6, 7, 8, 9, 13, 18, and 25; all of the 10th ward excepting precincts L, M, and R; precincts A and B of the 12th ward; precincts G, H, and I of the 26th ward; townships of Anderson, Columbia and Symmes; and all of Millcreek Township excepting the precinct within the City of St. Bernard, shall compose the First District."

That pretending to act under the Constitution of the State of

Ohio, Article II, Section 1c, and for the purpose and intent of causing said Act, passed May 27, 1915, to be submitted to a vote of the people for their approval or rejection, a petition signed by more than 6 per centum of the votes cast in Ohio for the office of Governor at the last preceding election therefor, duly verified, was filed with the Secretary of State, within ninety days after the said Act of May 27, 1915, was filed by the Governor of Ohio, in the office of the
27 Secretary of State; and that said Act was, at the next general election, to-wit, on November 3, 1915, by the Secretary of State, submitted to the electors of the State for their approval or rejection; and that at said election, said Act, of May 27, 1915, did not receive, and was not approved by a majority of those voting on the same.

That by reason of the facts above set forth, defendants have refused on application and demand by the relator and other electors of said District and of Ohio, and they still and will continue to refuse to hold elections in the year 1916, in the said First District of Ohio, and also the second representative district of Ohio, as defined and described by the said Act, passed May 27, 1915.

That under the laws of Ohio, Section 4954, of the General Code, an election must be held in each of the twenty-two congressional districts of the State of Ohio on the last Tuesday of April, 1916, for the election of two delegates, and two alternatives, to the National Republican Convention to be held in Chicago, Illinois, and a like number of delegates and alternates to the National Democratic Convention to be held in St. Louis, Missouri, and is and will be the duty of the said Board of Deputy State Supervisors and Inspectors of Elections, for Hamilton County, Ohio, in connection with, under the control and by the direction of the said State Supervisor of Elections, to provide for, supervise and control the holding of said election in the First and Second Districts of Ohio.

That under the laws of Ohio (General Code, Sec. 4959, 4960 and 4963) members of a controlling committee for each political party are required to be elected by direct vote of the people, in the even numbered years, such—

"controlling committees of each volunteer political party or organization to be a state central committee, consisting of one mem-
28 ber from each Congressional District in the State; a district committee for each district in the State, including Congressional Districts, which shall consist of a chairman of the county central committees of the several counties composing such district."

And candidates for election as members of said controlling committees are required to be nominated as provided in Sec. 4969, General Code of Ohio, in each even numbered year, and they are to be selected or elected on the second Tuesday in August of the even numbered years. And it will also be the duty of the said State Supervisor of Elections and Inspectors and said Deputy State Supervisors of Elections, to provide for, supervising and controlling the holding of the said primary election and for the election or selection of the members of said controlling committee in said

County of Hamilton, State of Ohio, in the proper and legally constituted First and Second Districts of Ohio.

That under the laws of Ohio, Section 4963 of the General Code, a primary election must be held in each of the twenty-two congressional districts of Ohio, upon the second Tuesday in August, 1916, for the nomination of candidates for members of the House of Representatives, in the Congress of the United States, and for all elective district officers, and it is and will be the duty of the said State Supervisor of Elections and said Board of Deputy State Supervisors and Inspectors of Election, and the individual members thereof, of Hamilton County, Ohio, to provide for, supervise, and control the holding of said primary election in the First and Second Districts of Ohio.

That upon the first Tuesday after the first Monday in November of 1916, it is the duty of the said State Supervisor and In-
29 spector of Elections and said Board of Deputy State Supervisors and Inspectors of Elections, and the individual members thereof, in Hamilton County, Ohio, to provide for, supervise and control and furnish ballots for the holding of the General Election, at which time persons nominated in the said districts and in the other districts of Ohio, as prescribed in said Act of May 27, 1915, by the several political parties, at the said August primaries of 1916, as candidates for members of the House of Representatives in the Congress of the United States, and candidates for Presidential electors are entitled to be on the regular and proper election tickets and to be voted for by the electors of the said First and Second Districts and the other districts of Ohio, And it is and will be the duty of Charles Q. Hildebrandt, Secretary of the State of Ohio, and by virtue of his office as State Supervisor and Inspector of Elections, and State Supervisor of Elections, to advise, control and direct the said Board of Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, as to their duties and power in the preparation for and the holding of the several different elections above described.

Your relator further states, that it is the intention and purpose of said defendants, and they will, unless required and directed otherwise by this Honorable Court to hold elections in the said First and Second Districts of Ohio, and in the other several districts as hereinbefore set out, and each of them, under the said Act of the Legislature of Ohio, passed April 28, 1913, in which Act the First and Second Districts of Ohio, described, are not composed of the same territory and parts of the State of Ohio, as the First and Second Districts of Ohio, described, bounded and limited by the said Act passed May 27, 1915.

Your orator further states, that the Act, passed May 27,
30 1915, is a valid, existing law, never repealed or superseded and it is binding upon the defendants and all the people of the State of Ohio, as to the boundaries of each of the twenty-two congressional districts, as in said last named Act particularly bounded and described; also as to the manner of holding the election in 1916 for Representatives in Congress and for Presidential Electors, and that it is the duty of the defendants to provide for and hold the sev-

eral elections in and for the First and Second Districts of Ohio, as is in the said Act of May 27, 1915, described and prescribed.

Your relator further represents, that the petition of the said six per centum of the electors of the State of Ohio, filed with the Secretary of State, as aforesaid, for the submission of said Act of May 27, 1915, to a vote of the people of Ohio, at the next general election, for its approval or rejection by the voters of Ohio, and the act of said Secretary of State submitting to the electors of the State for their approval or rejection said Act of May 27, 1915, and the failure of the majority voting at said election to approve said act, were and are each void, and of no effect, for the reason, among others, that Article II, Section 1*c*, of the Constitution of Ohio, cannot effect or apply to an Act of the Legislature of Ohio, districting or making an apportionment of the State of Ohio, into congressional districts, under the Thirteenth Census of the United States, and providing the manner of choosing the Representatives therein; that the authority of the Legislature of Ohio, to pass the said Act of May 27, 1915, was given to it exclusively by the Constitution and laws of the United States, and not under the Constitution or laws of Ohio, or other State authority.

Wherefore, your relator prays, that the above named de-
31 fendants, be notified of the pendency of this suit, and that an alternat-e writ of mandamus shall forthwith issue from this Court, fixing the time that said defendants shall answer this petition and respond to said alternative writ, that the same be served upon the defendants; and that upon the final hearing of this cause, that this Honorable Court shall declare the Act of the Legislature passed May 27, 1915, entitled,

"An Act to Amend Sec. 4828-1 of the General Code, making an apportionment of the State of Ohio, into Congressional Districts, under the Thirteenth Census of the United States," to be valid, existing and in full force in the State of Ohio, and that the filing as aforesaid of said petition by said electors with the Secretary of State, for the submission of this said Act of 1915, to vote of the people of Ohio, for their approval or rejection, and the Secretary of State's proceedings in submitting to a vote of the electors of Ohio, at the general election of November, 1915, by which said Act was not approved by a majority of those voting on the same, and the vote on such submission to be void and of no effect; and that a writ of mandamus be directed to be issued to the defendants; and each of them also adjudging and declaring said Act of 1913, to have been repealed and superseded and not now in force or effect; and that said Act of May 27, 1915, is in full force and effect and further commanding the defendants and each of them in their said official capacity, to hold, supervise and control the several district elections in the year 1916, in the said First and Second Districts of Ohio and other district elections within their jurisdiction, as described, required, defined and bounded in the said Act, passed May 27, 1915.

KEIFER & KEIFER,
SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

32 STATE OF OHIO,
Hamilton County, ss:

Personally appeared before me a Notary Public in and for Hamilton County, Ohio, David Davis, who, being first duly sworn, says that the facts stated in the foregoing petition are true.

DAVID DAVIS.

Sworn to before me and subscribed in my presence this 14th day of February, 1916.

[NOTARY SEAL.] WM. M. COFFIN,
Notary Public for Hamilton County, Ohio.

My Commission expires August 9, 1918.

33 In the Supreme Court of the State of Ohio.

No. 15160.

THE STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, Plaintiff,

v.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio; State Supervisors and Inspectors of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand, and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Demurrer.

(Filed Feb. 24, 1916.)

Now come defendants and demur to the petition herein, for the reason that said petition does not state facts which show a cause of action.

Respectfully submitted,
CHARLES Q. HILDEBRANT,
Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections,
By EDWARD C. TURNER,
Attorney General of Ohio.

TIMOTHY S. HOGAN,
EDMUND H. MOORE,
JAMES E. CAMPBELL,
Of Counsel.

34 In the Supreme Court of the State of Ohio.

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THE STATE OF OHIO on Relation of DAVID DAVIS, a Citizen and Resident of the United States and of Hamilton County, State of Ohio, Plaintiff,

v.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio; State Supervisors and Inspectors of Elections and State Supervisor of Elections; Robert J. Buchwalter, William J. McDevitt, Ray J. Hildebrand, and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Answer.

(Filed Feb. 24, 1916.)

Come now the defendants, Robert Z. Buchwalter, William J. McDevitt, Ray J. Hillenbrand and Thomas J. Noctor, constituting the Board of Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, and waive the issue and service of summons herein and voluntarily enter their appearance.

Further answering, defendants admit the allegations of fact contained in plaintiff's petition and pray for all proper relief to which they may be entitled in law or equity.

JOHN V. CAMPBELL,
Prosecuting Attorney, Hamilton County, Ohio,
By SMITH HICKENLOOPER,
Assistant Prosecuting Attorney.

STATE OF OHIO,
Hamilton County, ss:

Robert Z. Buchwalter, being first duly cautioned and sworn, says that he is a member and Chief Deputy of the Board of Deputy State Supervisors and Inspectors of Elections in and for Hamilton County, Ohio, that he has been specifically authorized by resolution of said Board to verify the foregoing answer on behalf of said Board and the individual members thereof and that the facts stated therein are true as he verily believes.

[SEAL.] ROBERT J. BUCHWALTER.

Sworn to before me and subscribed in my presence this 22nd day of February, 1916.

SMITH HICKENLOOPER
Notary Public, Hamilton Co., Ohio.

My Commission expires —.

35 *Opinion.*

THE STATE OF OHIO ex Rel. DAVID DAVIS, etc.,
v.
CHARLES Q. HILDEBRANT, Secretary of State, et al.

1. The term "legislature," in Section 4, Article I of the United States Constitution, comprehends the entire legislative power of the state; and, as so used, includes not only the two branches of the general assembly but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article II of the Ohio Constitution.

2. If a congressional redistricting act, passed by the general assembly and lawfully submitted to a referendum for popular vote under the foregoing provisions, fails of approval by a majority of those voting upon the same, such act is invalid and inoperative.

3. Under the latter clause of Section 4, Article I of the United States Constitution, complete and plenary power over state legislation enacted thereunder rests in the federal congress, and its laws supersede all state regulations upon the same subject. Under its grant of power to "make or alter such regulations," congress did, by its apportionment act of August 8, 1911, legislate upon the subject, by recognizing as lawful, such congressional districts as may be created in the manner provided by the laws of those states employing the constitutional referendum.

4. Where a ministerial officer assumes to act under a law or constitutional provision which is claimed to be invalid or of
36 doubtful construction, although the election of an officer is indirectly involved, the subject-matter becomes one for judicial cognizance and is not political.

(No. 15160—Decided April 18, 1916.)

In Mandamus.

37 This action was brought by the relator as a citizen of the United States and an elector of this state and who is a resident and elector in Hamilton County, Ohio, seeking to invoke the original jurisdiction of this court in mandamus.

The salient and pertinent facts set forth in the petition are as follows: On May 27th, 1915 the general assembly of the state passed an act which was approved by the governor and filed in the office of the secretary of state on June 4th, 1915, creating a re-districting and apportionment of the state into 22 congressional districts of which portions of Hamilton county constituted the first and second districts. Prior to that time, by virtue of an act of the general assembly, the state had theretofore been re-districted and divided into 22 congressional districts under an act passed April 28th, 1913, in which the districts, including the first and second, were geographically different from the later act of May 27th, 1915.

Assuming to act under Article II, Section 1c of the Constitution of Ohio, adopted in 1912, for the purpose of causing the later act of

1915 to be submitted to the people of the state for their approval or rejection, a petition containing the required number of signatures was filed with the secretary of state conformable to law, and at the general election following on November 3rd, 1915 the act of May 27th, 1915 was submitted to the electors of the state for their approval or rejection. At such election, however, the same did not receive, and was not approved by a majority of the electors
38 voting on the same.

By reason of these facts it is alleged that the defendants, Hildebrant, secretary of state and state supervisor and inspector of elections, and his associated defendants, who are deputy state supervisors and inspectors of elections for Hamilton county, now refuse and will continue to refuse to hold elections in the year 1916 in the first and second congressional districts composing Hamilton county, as divided and described in the act of 1915, which was submitted to referendum and failed of approval by popular vote; that delegates and alternates to political party conventions and political party committeemen are required by law to be elected at the elections ensuing in 1916, and furthermore that candidates for congress are required to be elected in the several lawful congressional districts at such ensuing election.

It is alleged that the state and deputy state supervisors and inspectors of elections, whose duty it is to provide for the machinery and control the elections, unless directed otherwise by the court, will proceed in the conduct of elections in the several districts under the act of 1913, although it is their duty to conduct the same in the districts as described in the act of 1915 which was subjected to referendum as aforesaid.

It is further alleged in the petition that the submission by
39 referendum to the people of the act of 1915 was void for the reason that the referendum provisions comprised in Article II, section 1c of the constitution of Ohio could not affect or supply to an act of the legislature of Ohio districting or making an apportionment of the state of Ohio into congressional districts, and that the sole power therefore is lodged strictly in the state legislature irrespective of the referendum so authorized and employed.

A writ of mandamus is prayed for, asking that the act of May 27th, 1915, entitled "An act to amend section 4828-1, General Code, etc.," be held valid, that the referendum proceedings be declared invalid, and that defendants be directed to hold, conduct and supervise the several district elections ensuing in the Hamilton county districts as territorially divided in the legislative act of May 27th, 1915. The defendants challenge the sufficiency of the petition by a general demurrer.

Messrs. Keifer & Keifer and Mr. Sherman T. McPherson, for plaintiffs.

Mr. Edward C. Turner, attorney general; Mr. T. S. Hogan; Mr. E. H. Moore; Mr. J. E. Campbell and Mr. A. G. Turnipseed, for defendants.

Mr. J. V. Campbell, prosecuting attorney, for the Board of Deputy State Supervisors and Inspectors of Elections for Hamilton county, answering defendants.

40 JONES, *J.*:

The question to be decided is succinctly stated in the brief of relator's counsel as follows:

"Whether or not the apportioning and redistricting Act of May 27, 1915, was annulled by petition and referendum vote held under the constitution of Ohio."

For the proper determination of this question it is necessary to refer, for the purpose of construction, to the following provisions of the state and federal constitutions, and to the laws passed pursuant thereto, so far as they may be germane to the proposition involved.

Section 4 of Article I of the Constitution of the United States provides as follows:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators."

Section 1c of Article II of the constitution of Ohio provides that, September 3, 1912, is as follows:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the gen-
41 eral assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

The sections immediately following provide for the initiative and referendum powers reserved to the people of the state and for the method in which such powers shall be exercised.

Section 1c of Article II of the constitution of Ohio provides that,

"No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law or any item in such law appropriating money be submitted to the electors of the state for their approval or
42 rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided, at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or

item shall go into effect until and unless approved by a majority of those voting upon the same.

The act of Congress of August 8, 1911, Chapter 5, Part 3, section 4 provides:

"In case of an increase in the number of representatives in any state under this apportionment such additional representative or representatives shall be elected by the state at large and other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section 3 of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

Section 5 of the same act provides:

"Candidates for representative or representatives to be elected at large in any state shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws
43 of such state."

Does the term "legislature," as used in Article I, section 4 of the federal constitution, comprehend simply the representative agencies of the state, composed of the members of the bi-cameral body, or does it comprehend the various agencies in which is lodged the legislative power to make, amend and repeal the laws of the state, including the power reserved to the people empowering them to "adopt or reject any law" passed by the general assembly under the provisions of section 1, Article II of the constitution of Ohio?

By the adoption of the constitution of 1912, as affecting the passage and finality of laws passed by the general assembly, the people provided for certain checks upon both the legislature and the people.

Section 1*d* of Article II of the constitution of Ohio provides that laws providing for tax levies and certain emergency laws, when passed by a yea and nay vote of two-thirds of all members elected to each branch of the general assembly, shall go into effect and shall not be subject to the referendum imposed by the preceding section. As to all other laws passed by the general assembly, the people have reserved to themselves the power of adoption or rejection.

These various sections disclose that, while the legislative power has been delegated to the bi-cameral body composed of the senate and house of representatives, the people of Ohio have by the
44 aforesaid provisions of their constitution determined the manner by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative, without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated at the "referendum."

While article 1, section 4 of the United States constitution is controlling upon the states in so far as it grants the legislature of the state, authority to prescribe the times, places and manner of

holding elections, this is the quantum of the federal grant. The character of the legislature, its composition and its potency as a legislative body are among the powers which are, by Article X of said constitution, "expressly reserved to the states or the people thereof."

Webster's Dictionary defined "legislature" as follows:

"The body of persons in a state, or politically organized body of people, invested with power to make, alter and repeal laws."

The Century Dictionary defines the same term as follows:

"Any body of persons authorized to make laws or rules for the community represented by them."

Under the reserved power committed to the people of the states by the federal constitution, the people by their state organic law, unhindered by federal check or requirement, may create any agency as its law making body, or impose on such agency any checks or conditions under which a law may be enacted and become operative. Acting under this recognized authority, the Ohio constitution, prior to the adoption of the amendment of 1912, provided that the "legislative power" of the state should be vested in the general assembly, consisting of a senate and house of reppresentatives. The same provision now exists, but by the adoption of the amendment of 1912, the people expressly limited this legislative power by reserving to themselves the power to reject any law by means of a popular referendum. The law making body, the legislature, as defined by lexicographers, comprehends every agency required for the creation of effective laws. It cannot be claimed that the term "legislature" necessarily implies a bi-cameral body. When the term was embraced in the constitution originally, the legislatures of Pennsylvania, Georgia and Vermont consisted of but a single house, with a second body in each called an executive council. These states later abolished their councils and established a legislature consisting of two branches, and such is the character generally of the various state legislatures today. 1 Bryce Amer. Com. p. 461 (Note).

The constitutional provision relating to the election of congressmen, conferring the power therein defined upon the various state legislatures, should be construed as conferring it upon such bodies as may from time to time assume to exercise legislative power, whether that power is lodged in a single or two-chambered body or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum vote. This view was sustained in State ex rel. Schrader v. Polley, 26 S. Dak., 5, a case similar to this. The case of McPherson v. Blacker, 146 U. S., 1, is relied on by the relator as sustaining his contention. That case simply decides that under clause 2, section 1 of Article II of the United States constitution state legislatures had exclusive and plenary power to direct the manner in which electors of president and vice-president should be appointed, and that the legislature might appoint the same directly or provide for their appointment by popular vote. The court did not undertake to define the term "legislature" or to deny that the authority granted to the legislature as a representative body might not likewise be exercised

by any agency invested by the people with legislative power. In disposing of the case Mr. Chief Justice Fuller said:

"The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed."

However, there is another valid reason why the writ should be denied in this case. While Article I, section 4 of the United
47 States constitution commits to state legislatures the right to prescribe the times, places and manner of holding elections, that article expressly reserves to the congress full and complete control of that subject. If there be any conflict between the legislative and congressional provisions upon that subject the latter control and the law of congress supersedes any law or regulation upon the subject made by the state legislature. The concluding sentence of the article is as follows: "But the congress may at any time by law make or alter such regulations."

Recurring now to the provisions of the act of congress of August 8, 1911, Chapter 5, Part 3, section 4, it was stipulated that the representatives to congress should be elected by the districts "now prescribed by law until such state should be redistricted in the manner provided by the laws thereof, and in accordance with the rules enumerated in section 3 of this act." Under the constitutional provision that congress might at any time by law make or alter regulations prescribed by the state legislature, it had full power to direct, as it did, that congressmen should be elected by the districts prescribed by the laws of the various states.

The congress could, under its supervisory control granted by Article I, section 4 of the United States constitution, requires that a legislature must act with an eye to the referendum. It could re-
quire legislative action in accordance with local state constitu-
48 tions. This congress did, in its apportionment law of August 8, 1911, when it recognized as lawful, newly created district after the state had been "redistricted in the manner provided by the laws thereof."

The language of section 4 of the original act as introduced in congress contained after the word, "redistricted," the following language: "By the legislature thereof in the manner herein prescribed." When the bill came before the senate of the United States, Mr. Burton, Senator from Ohio, offered an amendment, which was passed, striking out that language and inserting in lieu thereof the words found in the present act, to-wit:

"In the manner provided by the laws thereof and in accordance with the rules enumerated in section 3 of this act."

This action was taken by the senate advisedly and for the purpose of meeting such a situation as we have in Ohio, where the initiative and referendum is employed under state constitutions.

In the report of the 62nd Congress, found in Volume 47, Part 4, page 3436-7, and in support of the amendment referred to, Senator Burton said:

"A due respect to the rights, to the established methods, and to

the laws of the respective states requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes. * * *

49 "If you have a referendum in a state the object of which is to submit to the people at large the question of whether or not a statute shall stand, the question whether it is just or unjust, that provision ought especially to apply to a law dividing a state into districts, where there is such an opportunity for monstrous injustice. If there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill.

"Senators on the other side, and on this side as well, have of late addressed the senate ardently advocating the principle of the referendum and the initiative. I shall be interested to know whether they will permit the restriction, 'by the legislature thereof,' to remain in this statute. * * *

"So I have suggested that the senate strike out the words 'by the legislature thereof in the manner herein prescribed,' and insert in lieu thereof, first, the words 'in the manner provided by the laws thereof.' This gives to each state full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each state the message 'Proceed and district your state in accordance with your laws.' This act does not do that. It sends the message, 'Do it in only one specified way; that is, by your legislature.' "

The fact is, and it was conceded in the discussion, that the earlier apportionment acts passed by congress following the decen-
50 nial censuses of 1880, 1890 and 1900, employed the language of the bill, "by the legislature thereof."

In the controversy over the amendment the storm raged over the single question, whether there was any necessity for the Burton amendment; that the language of the bill would vouchsafe a referendum of an act of the legislature, without employing the language proposed in the amendment.

On page 3508 of the record, the Senator from Ohio said:

"In several states * * * the referendum has been adopted. It was very natural in 1890, and even in 1900, that a provision should be incorporated that the states should be redistricted 'by the legislature thereof,' because that was the only law making power; but since then a new method of making laws has been devised and we cannot afford to cling either to obsolete phraseology or, in our dealing with the states, to adhere to obsolete methods—that is, to ignore their methods of enacting laws."

"Mr. Shively: Mr. President, it is not a matter of adhering to obsolete methods or dealing with obsolete phraseology. I am entirely willing that a state shall determine what shall be the rule of apportionment within that state, but I still insist that the language of this bill does not prohibit the legislature from arranging the districts by referendum of the act to the people."

In view of what we have said as to the construction to be
51 given to the term "legislature" in the constitutional provision referred to, it would seem that the amendment offered

by Senator Burton was not necessary to accomplish the result sought. However that may be, it is self-evident that congress took the subject out of the realm of doubt by providing that the redistricting should be made in the manner provided by the state laws, and furthermore that the language of the act was specifically changed to conform to the constitutions of those states where the referendum is employed. Congress had full power, under the provision of section 4 of Article I of the United States constitution, "the congress may at any time, by law, make or alter such regulations," to pass an act of this character.

The act of congress is paramount and supersedes any and all laws or regulations made by the state legislature upon that subject. This is implied in the power to "make or alter." Ex parte Siebold, 100 U. S., 371, 383.

We, therefore, hold that the act of April 28, 1913, passed by the general assembly of Ohio, was valid and that the act of May 27, 1915, thereafter passed by the general assembly, and failing of approval by popular vote under the referendum, was invalid and void.

On behalf of the defendants the attorney general contends that the questions involved in this case are not justiciable; that they are political rather than judicial.

52 In support of this contention many cases have been cited. Section 5 of Article I of the federal constitution provides that, "each house shall be the judge of the elections, returns and qualifications of its own members * * *." Did the case presented involve questions which affect the wisdom or policy of legislation, this court could, of course, not intervene. Thus, in cases where the legislative discretion in the creation of congressional districts was sought to be reviewed, the question would be purely political and not judicial. In such cases the farthest that the courts have gone is to interfere only where there has been such a gross abuse of legislative discretion as to be palpably an evasion of the law or constitution. The record in this case discloses that the defendants, as ministerial officers of the state, are refusing to proceed under an act of the general assembly which they claim to be an invalid law. The power of determining whether a law or constitutional provision is valid or otherwise is lodged solely in the judicial department. The construction of the laws and constitution is for the courts, and it is generally held in such cases, although they may indirectly involve the election of political officers, that where the validity of such election depends upon the construction of a law or constitutional provision under which such election is held, then the question is justiciable and not political. This rule has been applied

53 in cases involving apportionment of congressional and other districts in the following cases: State v. S. Kingstown, 18 R. I., 258; State v. Wrightson, 56 N. J. L., 126-187; Denny et al. v. State, 144 Ind., 503; Harmison v. Ballot Com'rs, 45 W. Va., 179; State ex rel. Lamb. v. Cunningham, Secy. State, 83 Wis., 90-135; People v. Thompson, 155 Ill., 451; Giddings v. Secretary of State, 93 Mich., 1; McPherson v. Blacker, Secy. of State, 92 Mich., 377.

The latter case was taken on error to the Supreme Court of the United States and reported in 146 U. S., 1. It was urged in that case that the subject matter of the controversy was not of judicial cognizance, for the reason that all the questions connected with the election of a presidential elector were political in their nature and that any decision the court might make would be subject to review by political officers or agencies, such as a state board of canvassers or the congress. Mr. Chief Justice Fuller, on page 24, touching that question said:

"The question of the validity of this act, as presented to us by this record, is a judicial question, and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the highest tribunal of the state as revised by our own."

Therefore, whether the secretary of state and his deputies in their ministerial capacity shall act under the legislative act of April 28, 1913, or under the later act of May 27, 1915, and the de-
54 termination as to which of said acts is valid, is a judicial question and not a political one, and this court, under the constitutional provision giving it original jurisdiction in mandamus, assumes jurisdiction.

The demurrer to the petition will be sustained, and the writ denied.

Writ refused.

Nichols, C. J., Johnson, Donahue, Wanamaker, Newman and Matthias, JJ., concur.

55 STATE OF OHIO,
City of Columbus:

Supreme Court of the State of Ohio, of the Term of January, A. D. 1916.

I, E. O. Randall, Reporter of the Supreme Court of Ohio, do hereby certify that the foregoing (20 pages) is a true and correct copy of the opinion of the Supreme Court of Ohio in case No. 15160, The State of Ohio ex rel. David Davis, etc., v. Charles Q. Hildebrant, Secretary of State, et al., as the same is now on file in this office.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 27th day of April, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

E. O. RANDALL, *Reporter.*

[Endorsed:] Filed Apr. 27, 1916. Supreme Court of Ohio, Frank E. McKean, Clerk.

56 *Certificate of Lodgment.*

STATE OF OHIO,
Supreme Court, ss:

I, Frank E. McKean, Clerk of said Court, do hereby certify that there was lodged with me as Clerk on April 27, 1916, in the case of State of Ohio ex rel. David Davis, plaintiff, against Charles Q. Hildebrant, Secretary of State of Ohio, et al., defendants:

1. The original bond, a copy of which is herein set forth.
2. Six copies of the writ of error, as herein set forth, one for each defendant and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Court at my office in Columbus, this 27th day of April A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

57 In the Supreme Court of Ohio.

No. 15160.

STATE OF OHIO, ex Rel. David Davis, a citizen and resident of the United States and of Hamilton County, State of Ohio, Plaintiff,

vs.

CHARLES Q. HILDEBRANT, Secretary of State of Ohio, State Supervisor, and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand, and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, Defendants.

Certificate.

STATE OF OHIO,
City of Columbus, ss:

I, Frank E. McKean, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing petition for writ of error and order allowing writ, assignment of errors, writ of error, citation and acknowledgment of service thereof, are the original papers filed in this Court in the above entitled cause; that the foregoing copy of bond is a true and correct copy of the original bond filed in said cause; that the foregoing transcript of docket and journal entries is truly taken and correctly copied from the Records of said Court; that a copy of the opinion in said cause duly authenticated by the Supreme Court Reporter is hereto attached; I further certify that the foregoing copies of petition in mandamus, demurrer of Charles Q. Hildebrant, Secretary of State, and Answer of the defendants

The Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio, are true and correct copies of the originals of said pleadings filed in my office, and that all of the foregoing constitute a true, full and correct transcript of the record and all proceedings had in said cause in the Supreme Court of the State of Ohio.

In witness whereof, I have hereunto subscribed my name and affixed the Seal of the Supreme Court of Ohio, this 27th day of April, A. D. 1916.

[Seal the Supreme Court of the State of Ohio.]

FRANK E. McKEAN,
Clerk of the Supreme Court of Ohio.

[Endorsed on cover:] File No. 25,270. Ohio Supreme Court. Term No. 987. The State of Ohio on Relation of David Davis, Plaintiff in Error, vs. Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections, et al. Filed April 29th, 1916. File No. 25,270.

Office Supreme Court, U. S.
FILED
APR 29 1916
JAMES D. MAHER
CLERK

No. 987

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

STATE OF OHIO, EX REL. DAVID DAVIS, ETC.,
PLAINTIFF,

vs.

CHARLES Q. HILDEBRANDT, SECRETARY OF
STATE OF OHIO, ET AL., DEFENDANTS.

MOTION TO ADVANCE CASE FOR HEARING.

KEIFER & KEIFER,
SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

SUPREME COURT OF THE UNITED STATES

No._____

STATE OF OHIO, EX REL. DAVID DAVIS, ETC.,

vs.

C. Q. HILDEBRANDT, SECRETARY STATE OF OHIO, ET AL.

MOTION TO ADVANCE.

Come now Keifer & Keifer and Sherman T. McPherson, attorneys for plaintiff, the appellant, and move this court to advance the above-mentioned cause for hearing on oral arguments and briefs at as early a date as may be convenient to the court.

The cause is in this court by Writ of Error duly allowed and filed, together with a Petition and Assignments in Error and other records from the Supreme Court of the State of Ohio in an action in mandamus wherein the above-entitled plaintiff was plaintiff and defendants were defendants; and whereby the State of Ohio, *ex rel.* David Davis, petitioned and prayed that court to adjudge an act of Legislature of Ohio passed May 27, 1915, prescribing the times, places and manner of electing Representatives to Congress in the State of Ohio, to be valid and in full force and effect, and commanding the said defendants and each of them by proper writ in mandamus to, in their several official characters, to enforce the same; the said Secretary of State, by

virtue of his office, being State Supervisor and Inspector of Elections and State Supervisor of Elections for said State, his duty being by law to control, supervise and direct the several Deputy State Supervisors and Inspectors of Elections and the Boards constituted by them, and the said other defendants being the Deputy State Supervisors and Inspectors of Elections for the County of Hamilton, State of Ohio, said County including the First and Second Congressional Districts of Ohio, as constituted by said Act of May 27, 1915. The prayer of the petition asks that defendants be required to provide for, hold and conduct elections in 1916 in said County and Districts for Representatives in Congress as said Act provides, they and each of them, on demand, having refused to do so.

The Supreme Court of Ohio found and adjudged said Act of 1915 was not a valid and existing law for the reason that subsequent to its passage, approval by the Governor of Ohio and its going into effect, a petition was filed under an Amendment to the Constitution of Ohio for a so-called referendum vote upon said Act, and a vote had thereon rejected the Act at the November election of 1915.

The said cause manifestly draws in question an authority of the Legislature of Ohio exercised under the United States and the Constitution thereof, and the decision was against the validity of said Act and the due execution of such authority.

The impending election of said Representatives, and the necessary prior nominations of candidates therefor and other necessary committees and delegates, State and National, provided by law, make it of the highest importance to said State of Ohio and the several Congressional Dis-

tricts of said State as well as the said First and Second Districts thereof, that an early final decision be had of this cause in this court.

Opposing counsel consent, for their respective clients, as shown by paper on file, to this application being granted, and they, in like manner, waive the time granted in such cases for defendants to appear and respond in this case.

Respectfully submitted,

KEIFER & KEIFER,

SHERMAN T. McPHERSON,

Attorneys for Plaintiff.

Office Supreme Court, U. S.
FILED
MAY 1 1916
JAMES D. MAHER
CLERK

8

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 987.

THE STATE OF OHIO EX REL. DAVID DAVIS, ETC.,
PLAINTIFF IN ERROR,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, ET AL.

SUPPLEMENTAL MEMORANDUM ON MOTION TO ADVANCE.

We have asked for oral argument and desire it very much, but will waive same if the granting of oral argument would prevent the hearing at the present term of this court. The importance of the disposition of this case before the summer vacation of the court is the fact that it has to do with the impending nomination and election of 22 Congressmen in Ohio, and in that manner directly affects the whole United States. Nominations are to be held on the second Tuesday in August in each congressional district.

Opposing counsel have consented to waive oral argument,

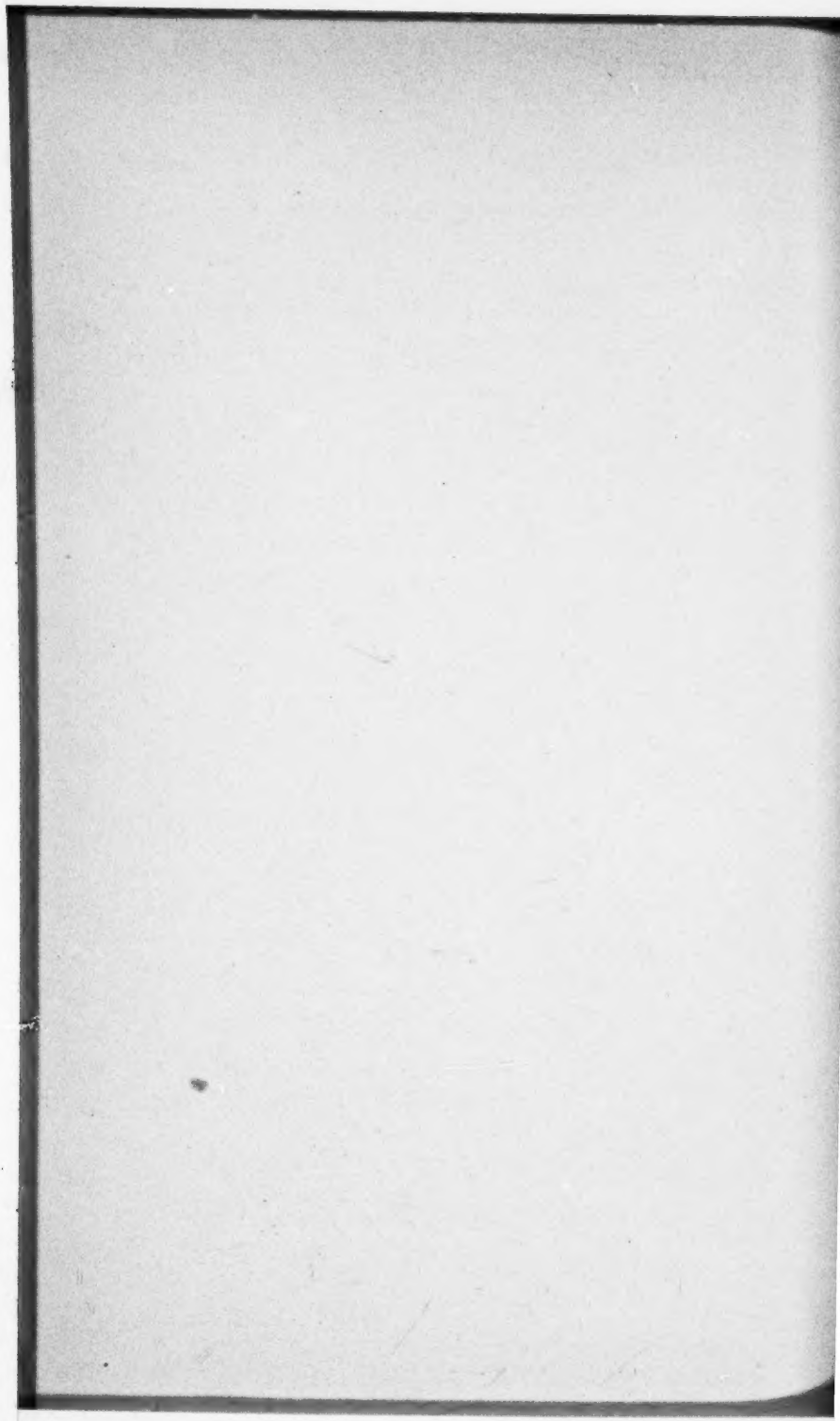
which consent has been placed on file in this court and is in the following words:

"Much prefer oral argument, but if absolutely necessary will waive if reasonable time for briefs given."

Respectfully submitted,

J. WARREN KEIFER,
SHERMAN T. McPHERSON,
Attorneys for Plaintiff in Error.

(31180)



No. 15,160

In the Supreme Court of Ohio

STATE OF OHIO, ex rel.
DAVID DAVIS, Esq., Etc.
Plaintiff,

—vs.—

C. G. HILDEBRANDT,
Secretary of State, et al.,
Defendants.

Petition in Mandamus

Brief for Plaintiff

The Young & Bonsall Press, Springfield, Ohio

In the Supreme Court of Ohio

State of Ohio on Relation of David Davis, a Citizen and Resident of the United States and of Hamilton County, State of Ohio,

Plaintiff,

—vs.—

Charles Q. Hildebrant, Secretary of State of Ohio, State Supervisor and Inspector of Elections and State Supervisor of Elections; Robert Z. Buchwalter, William J. McDevitt, Ray J. Hildebrand and Thomas J. Noctor, Deputy State Supervisors and Inspectors of Elections for Hamilton County, Ohio,

Defendants.

No. 15160

Petition for Mandamus

Filed February 15, 1916

THE CASE

The question made, is: Whether or not the apportioning and redistricting Act of May 27, 1915, was annuled by petition and referendum vote held under the Constitution of Ohio.

The legislature of Ohio, passed, April 28, 1913, an Act supplemental to Sec. 4828, G. C., called Sec. 4828-1, which divided the State of Ohio into 22 Congressional districts.

Ohio Laws (1913) Vol. 103, p. 568.

The legislature of Ohio, passed, May 27, 1915, an Act amending and repealing said Sec. 4828-1 (the 1913 Act) and divided the State into 22 Congressional districts, differing in boundaries from the 1913 Act.

Ohio Laws (1914-1915) Vol. 106, p. 474.

Both acts created districts according to the Act of Congress "for the apportionment of Representatives in Congress among the several states under the 13th Census." (1910.)

U. S. Stat. 1, Sess. 62 Cong. (passed Aug. 8, 1911), Sec. 3.

A referendum vote, held November 2, 1915, rejected the 1915 Act, which annulled it and left the 1913 Act in effect if referendum could apply to it. If referendum was not applicable to either Act, then the 1915 Act is in force.

Repeal of the former Act was proper but not necessary as the right to *prescribe* the time, manner, etc., of electing Representatives to Congress is a continuous one, the latest Act being operative, like rules for a legislative body.

II Hinds' Prec. p. 25.
U. S. v. Ballin, 144 U. S. p. 5.

MANDAMUS.

This court has original jurisdiction in *mandamus*, and to require "boards or persons" to perform acts which the law specially enjoins as a duty resulting from an office, trust or station."

Con. of Ohio, Art. IV, Sec. 2.
G. C., Sec. 12283.

The relator must have a "beneficial interest," and an *elector* has such interest where public officers are concerned.

G. C., Sec. 12287 (old Sec. 6744 R. S.)
State ex rel. v. Brown, 38 O. S. 344, 346.
State ex rel. v. Tanzey, 49 O. S. 656, 662.
State ex rel. v. Beal, 60 O. S. 213.
State ex rel. v. Nash, 66 O. S. 612.
State ex rel. v. Henderson, 38 O. S. 644, 649.

The nomination of party candidates concerns the public welfare.

State ex rel. v. Webber, 77 O. S. 554.

Where the public is concerned, the State may go beyond the point where the rights of the relator ceases.

State ex rel. v. Railway, 15 O. C. C. 200.

FEDERAL CONSTITUTIONAL PROVISIONS.

The Constitution of the United States grants power to State legislatures thus:

> "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State *by the Legislature thereof*; but the Congress may at any time by law make or alter such legislation, except as to the place of choosing Senators."
>
> Art. I, Sec. 4, Con. U. S.

The Constitution of the United States also provides:

> "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."
>
> Art. XIV, Sec. 2.

There are other instances where the Constitution of the United States confers special rights on State *Legislatures*, and they serve to show that Sec. 4, Art. I, confers an exclusive right.

Art. II, par. 1 (relating to Presidential electors), reads:

> "Each State shall appoint, in such manner as the *Legislature* thereof may direct, a number of electors, equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress."

Art. I, Sec. 8 (par. 11), requires, before sites for forts, etc., are purchased:

> "*Consent* of the *Legislature* of the State in which the same shall be, for the erection of forts, magazines, and arsenals, dockyards, and other needful buildings."

Art. IV, Sec. 4 (relating to the U. S. protecting States from domestic violence), reads:

> "Shall protect each of them against invasion; and on application of the *Legislature*, or of the Executive (when the Legislature cannot be convened) against *domestic violence*."

Art. V, relating to Congress calling conventions to amend the Constitution of the United States and to ratifying amendments, reads:

> "On application of the Legislature of two-thirds of the several States, shall call a convention for proposing amendments, which * * * shall be valid * * * as parts of the Constitution, when ratified by the Legislatures of three-fourths of the several States, or by Conventions in three-fourths thereof, as * * * may be proposed by Congress."

Art. VI, declares:

> "The Constitution and laws of the United States * * * shall be the supreme law of the land; and the judges in every State shall be

bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Sec. 3, Art. II, required:

"Senators from each State, chosen by the Legislature thereof."

This was (1913) amended (Art. XVII) requiring their election by the people.

FEDERAL STATUTES.

U. S. statutes require Representatives to be elected in separate districts composed of contiguous territory.

R. S. U. S. (1878), Sec. 25.
Now U. S. Statutes (passed, Aug. 10, 1911.) Sec. 3 (62 Cong.), p. 14.

Representatives are required to be elected the Tuesday after the first Monday of November in even numbered years.

Sec. 24 R. S. U. S.
G. C. (Ohio) Sec. 4828.
Present Stat. U. S. (1911) Sec. 14, p. 14.

These provisions contemplate redistricting by State Legislatures.

For reference to the foregoing U. S. laws, see; Ex parte Yarmouth, 110 U. S. p. 660-1.

REFERENDUM—CONSTITUTION OF OHIO.

The Constitution of Ohio, as amended (Sept. 12, and took effect Oct. 1, 1912), for the first time, provides, by petition, for a referendum vote on laws passed by the Legislature of the State. It reads, in part;

"The legislative power of the State shall be vested in a general assembly consisting of a senate and house of representatives, but the people

reserve to themselves the power to propose to the general assembly laws and amendments to the Constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the Constitution and to adopt or reject the same at the polls."

Art. II, Sec. 1, Con. of Ohio.

A referendum vote can be had on a law only after petition signed by;

"Six per centum of the electors * * * filed within ninety days after any law shall have been filed by the Governor in the office of the Secretary of State."

Art. II, Sec. 1c, Con. of Ohio.

This six per centum is based on the number of votes cast at the preceding Governor's election. (Art. II, Sec. 1g.)

The exceptions from petitions and referendum are:

"Laws providing for tax levies, appropriations for the current expenses of the State government and State institutions and emergency laws necessary for the immediate preservation of the public peace, health or safety."

And such laws must pass on a two-thirds, yea and nay vote, of all members of the general assembly.

Art. II, Sec. 1d.

LEGISLATURE.

Possesses Exclusive Power to Prescribe Manner of Choosing Representatives.

But for Sec. 4, Art. 1, Con. U. S., the State legislatures would have no authority relating to the manner of electing Senators and Representatives in Congress,

as the State, nor the people thereof, never possessed any authority relating to the organization of the Congress of the United States.

Referendum, applicable to State matters, is not attacked; it may be commended, and, where applicable, as operating for a good and wise purpose.

It cannot, however, be used to overthrow express powers derived solely from the Constitution of the United States.

Referendum was unknown when the Constitution of the United States was (1789) adopted. Referendum is, in no way, a part of the legislative power of the United States. No law of the Ohio legislature requires an approving vote of the people in the first instance. By a vote of the people, through the *initiative*, a measure which the legislature refuses to pass may become a law by a vote of the people, entitled "*Be it enacted by the people of the State of Ohio.*"

Art. I, Sec. 1b, 1g, Con. of Ohio.

The reservation (Sec. 1, Art. II), to the people of the State to reject laws passed by the legislature, cannot be held to reserve to them rights they never had; and rights reserved to the States or the people by the Constitution of the United States, are rights possessed by all the States or all the people thereof.

Arts. IX and X, Con. U. S.

The right to create or participate in creating the Congress is necessarily vested absolutely in the United States.

Con. U. S. Art. I, Sec. 1.

(Petition, Alone, Overthrows Power of Legislature.)

But, as we shall see, petition and referendum as provided for in Ohio, will defeat, in a substantial sense, the legislature from legislating at all on the subject; *petition* alone, signed by less than two per

centum of the *people* of the State would accomplish the same thing.

Petition alone renders unnecessary a referendum vote of the people of the State on all laws relating to the electon of Representatives in Congress unless passed within *seven months* after a November election in odd numbered years. If passed later than that and before the next November election in the even numbered year, petition alone postpones the law taking effect, and the referendum vote in such even numbered year, to the time a new Congress is elected.

Art. I, Sec. 1c, Con. of Ohio.

For examples:

a. Had the legislature of Ohio passed a law after referendum went into effect (Oct. 1, 1912), to provide for the election of twenty-two Representatives in the 64th Congress, a petition would have prevented its going into effect until after the November 1912 election when members to that Congress were elected.

b. If the legislature had passed a law to provide for the election of Representatives in the 63rd Congress (beginning March 4, 1913) any time after referendum under the Con. of Ohio went into effect (Oct. 1, 1912) petition alone would have prevented a referendum vote thereon until the November 1913 election, and Representatives to that Congress could not have been chosen under it.

c. If, after the next (1920) census a law should be passed by Congress, after June 8, 1921, for reapportionment, as always necessary after each census, for the Congress next succeeding (as Congress did, Aug. 8, 1911, for the 63rd Congress) petition alone would prevent it going into effect, and the State might be without a required apportionment.

Similarly, had petition and referendum been in effect in 1911 when the 63rd Congress was

elected, an Ohio Act of apportionment passed after the Aug. 8, 1911, Act of Congress was passed could have been defeated by petition alone.

These results follow, because a petition for referendum may be filed the last of ninety days after the law is filed with the Secretary of State, and no referendum election on the law could be held until more than *sixty* days thereafter,—more than one hundred and fifty days after the filing.

Con. of Ohio, Art. II, Sec. 1c.

The regular sessions of the Ohio Legislature "commence on the first Monday of January biennially" in the odd numbered years.

Art. II, Secs. 2 and 25, Art. XVII, Sec. 1.
State ex rel. v. Creamer, 83 O. S. 412.

A plan that gives to an insignificant number of the people the right for *seventeen* months of each two years, the absolute power to defeat a legislative act on a particular subject should be held void as to such act if no other reason existed.

Laws are held *void* that are made to take effect on some other authority, and by "popular vote."

Barto v. Himrod, 8 N. Y. (4 Seld.) 483.

REFERENDUM.
HOWEVER REQUIRED, CANNOT APPLY.

"The language of the Constitution is imperative as to the performance of many duties. It is imperative on the State legislatures to make laws prescribing the time, places and manner of holding elections for Senators and Representatives, and for electors of President and Vice-President."

Martin v. Hunter, 1 Wheaton, 304.

This case was decided in 1816, opinion by Justice Joseph Story, concurred in by Marshall, Chief Justice, and the other Associate Justices. The case called for a general review of the Con. involving conferred powers.

"It (the Con. U. S.) recognizes that the people act through their representatives in the legislature, and leave it to the legislature *exclusively* to define the method of affecting the object."

McPherson v. Blacker, 146 U. S. 27.

* * * * * * *

"What is forbidden or required to be done by a State is forbidden or required of the legislative power under State constitutions as they exist. The clause under consideration does not read *that the people or the citizens shall appoint*," etc.

Supra, 146 U. S. 25.

* * * * * * *

"Still less can we recognize the doctrine that because the Constitution has been found in the march of the time sufficiently comprehensive to be applicable to conditions not within the minds of the framers, and not arising in their time, it may therefore be wrenched from the subjects expressly embraced within it."

Supra, 146 U. S. 35-6.

"We repeat that the main question is one of *power*, not of policy."

Supra, 146 U. S. 42.

And see views of Stephen A. Douglas—
1 Bartlett, &c., p. 51.

In a syllabus (1816) the Supreme Court of the United States, speaking of the Constitution say:

"The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence, and restrictions and specifications, which at the present might seem salutary, might, in the end, prove the overthrow of the system itself."

Surpa, 1 Wheat, 304.

"Whenever a particular object is to be effected, the language of the Constitution is always imperative; and cannot be disregarded without violating the first principles of public duty."

Opinion, Justice Story (*Surpa*) 1 Wheat, 304.

Before considering cases and decisions of courts and of the Senate and House of Congress, we repeat, that it is established that the people of Ohio never had or could have, save by provision of the Constitution of the United States, the right to provide for the election of Representatives in Congress, and, therefore, they never could have any such power on the subject reserved to them by the Constitution of Ohio, and, as we have also shown, they, in no way, participate, with the legislature in the passage of laws; and as referendum was unknown when the Constitution of the United States was framed (1787), there is no reasonable ground for claiming the Act in question has been effected by referendum.

No law passed by a vote of the people of the State would be a law of the "*Legislature* thereof," and there can be no such thing as even a law passed by the legislature and the people. The people by vote can reject a law passed by the legislature; unless rejected after petition for a vote of the people, acts of the leglature go into effect.

By invoking the initiative and referendum the people can, by a majority vote pass a law, which the legislature has previously rejected. If there is no petition for a vote of the people laws passed by the legislature go into effect, and they go into effect unless rejected by such vote—they are called laws in the Constitution before petition for referendum.

Art. II, Sec. 1c, 16.

RULES OF CONSTRUCTION.

We also first submit some further general principles governing the construction of constitutions and laws.

The Constitution of the United States is supreme whenever it speaks; and certainly as to matters relating to its own organization and existence.

Con. of U. S., Art. VI (original.)
Ex parte Seibold, 100 U. S. 371, 10-11, pp. 398-9.
Ex parte Yarborough, 110 U. S. 651-2, 658, 661.

The following are some authoritative constructions of the Constitution of the United States and the powers thereunder, important in determining the main question here involved.

The *consequences* of a constitution or law should be taken into consideration in construing it.

Slaughter House Cases, 16 Wall, 36, 78.
4 Ency. U. S. Rep. p. 50, par. 12, and n. 83.

"Constitutional mandates are imperative. The question is never one of *amount*, but one of power. The applicable maxim is "obsta principiis," not "de minimis non curator lex." And so whenever a particular object is to be effected, the language of the constitution is always imperative," etc.

Fairbanks v. U. S., 181 U. S. 283, 291.
4 Ency., etc., p. 50, par. 13, notes 84, 85.

"The Constitution is a written agreement. As such its meaning does not alter. That which it meant when adopted it means now."

4 Ency., U. S. Rep. p. 36, par. 3, n. 39.
Scott v. Sanford, 19 How. 393, 426.
McPherson v. Blacker, 146 U. S. 1, 36.
Parker v. Loan Co., 158 U. S. 601, 621.
South Carolina v. U. S., 199 U. S. 437, 448.

"Courts must look to the history of the times

and examine the state of things then existing when it (the Constitution) was framed and adopted in order to correctly interpret its meaning."

4 Ency., etc., p. 37, n. 41.

R. I. v. Mass., 12 peters, 657, 723.

So, as to contemporary exposition.

4 Ency., etc., pp. 37-8, n. 43.

"When called on to construe and apply a provision of the Constitution of the United States w must look not merely to its language, but to its historical origin," etc.

Missouri v. Illinois, 180 U. S. 208, 219.

A state is described and defined—"a government under which the people live, etc."

Texas v. White, 7 Wall, 700.

See, as to constitutional limitations of states—

4 Ency., etc., p. 138-9, n. 61.

Barron v. Baltimore, 7 Pet. 243.

The Constitution of the United States renders *void*, and "*annuls whatever is done in opposition to it.*"

Poole v. Fleeger, 11 Pet. 185, 212d.

"If the power of a state and that of the Federal government come in conflict, the latter must control, and the former must yield."

Cummings v. Chicago, 188 U. S. 410, 428.

4 Ency., etc., p. 180.

"The language of the Constitution is *imperative* on the *State Legislature* to make laws *prescribing* the times, places and manner of holding elections for Senators and Representatives, and for the electors of President and Vice-President."

Martin v. Hunter, 1 Wheat 304.

And see Congressional precedents, below pp. 33-38.

* * * * * * *

The manner of choosing Senators and Representatives was one of the numerous compromises and concessions to the States, but conditioned on its being satisfactorily exercised. It is said that

"Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."

Prigg v. Penna., 16 Pet. 540, 610.

LEGISLATURE

Prescribes the Time, Manner, etc., of Choosing Representatives in Congress on Federal Authority.

Strictly speaking the *prescribing* required by Sec. 4, Art 1 of the Constitution of the United States, is not a law in the ordinary sense; especially not a law of the State; it is the discharge of a delegated Federal duty or power, often called a Federal Act, the same as if passed by Congress under the same provision of the Constitution of the United States. In the absence of that provision neither the legislature nor the people of the State would have any authority in the premises.

So well was it settled that the Constitution of the United States imposed absolute power on the legislatures of States to elect Senators that it was found necessary to amend the Constitution of the United States (1913) to give the people of the States the right to elect them.

The matter of electing Senators was provided for in the same Article (1) and Section (4) of the Constitution of the United States, and in the same language. There was as much right for the people, through referendum, or otherwise, to interpose and

assume to regulate or elect Senators as Representatives.

The supreme test as to the application of the Ohio referendum, either by petition or by vote of the people is, whether or not it would control or tend to control, limit or tend to limit or govern the legislature of Ohio in performing its duty and in exercising the power absolutely imposed on it by the Constitution and laws of the United States. If, in any way, such referendum would have such effect, it is wholly inapplicable, as are all state constitutions and laws having such effect.

If the Constitution of Ohio, or a law passed in pursuance thereof, directly and expressly provided that the legislature of Ohio should not obey the Constitution of the United States and the laws thereof relating to redistricting the state for Congressional purposes and as to fixing the times, places and manner of holding elections for Representatives in Congress, etc., save as directed by the vote of the people of Ohio, everybody would, at once, agree such provision was *void.*

In line with our contention it is held that jurisdiction conferred by the Constitution of Ohio cannot be taken away by the legislature.

Randall v. State, 64 O. S. 64.

"What cannot be done directly cannot be done indirectly."

It is easy to show, conclusively, that the referendum, if applicable, would operate exactly as the suggested provision would.

If the Ohio referendum was applied to a redistricting act the Congressional apportionment would have to be made for a new Congress long enough before the representatives were required to be elected thereto to enable the redistricting act to be passed.

The only question here is— can an Act of the legislature of Ohio providing the manner of electing Representatives to Congress be vetoed by a vote of the people of the State?

Referendum amounts to nothing more than a veto.

We submit that the veto of the Governor is not required to make valid an act of a legislature prescribing the manner of electing Representatives in Congress.

See infra, pp

We believe a resolution by the Legislature prescribing the Congressional districts of Ohio would be amply sufficient to meet the requirements of the Constitution of the United States, and form what clearly indicated the will of the Legislature, would be sufficient, and we do not believe such an act of the Legislature, whether prescribed in the form of a law or resolution would require the signature of the Governor.

In our opinion the people of the State can, in no sense or at any time, under any circumsances be called the Legislature as contemplated in the Constitution of the United States.

The question here involved is supported by views of the most distinguished jurists and statesmen of this country for more than one hundred years.

In the Massachusetts convention of 1820 to revise its constitution a resolution was submitted to provide for the election of members of Congress in such districts "as the legislature shall direct," which would have been a limitation on its power granted by the Constitution of the U. S.

In the discussion which followed, Justice Story, a member of the convention, declared that the resolution

> "assumes control over the legislature which the Constitution of the United States does not justi-

> fy. It (the legislature) is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provision to which I have referred."

Justice Story was followed by Daniel Webster, also a member, who declared that

> "Whatsoever was enjoined on the legislature by the Constitution of the United States, the legislature was bound to perform, and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution."
>
> I Hinds' Prec. p. 653.

Of course, the proposition failed.

Justice Story had (1816) delivered the opinion in 1 Wheat, 304 (mentioned, *supra*, 10-13) on the same question, and both he and the great constitutional lawyer, Webster, never had occasion to change their opinion that nothing in a State constitution could interfere with the right given to the legislature of the State by Sec. 4, Art. I, Con. of the U. S.

And nothing is better grounded in sound principle and right reason and better settled by authority than that where a power is solely conferred, whether personal, judicial or legislative, no interference with its independent exercise is tolerated or permitted.

FEDERAL AND STATE DECISIONS.

The question of the power granted to a State legislature to exclusively "prescribe" the

> "times, places and manner of holding elections for Senators and Representatives in Congress."

also presidential electors, etc., has been frequently determined judicially, and in each branch of Congress.

> We have quoted or referred to the several provisions of the Con. of the U. S. granting power to State legislatures, *supra*, pp. 3-5.
>
> And we, for obvious reasons, disregard here the recent amendment to the Con. of the U. S. providing for the election of Senators by the people of each State, save as a national example of the necessity to change the power granted State legislatures by amending the Con. of the U. S. (*Supra*, p. 5.)

We call attention to cases already cited showing the exclusive right given to State legislatures to prescribe the manner, etc., of electing Representatives. (*Supra*, pp. 9-11.)

The whole question was considered and decided in a Michigan case involving the choice of *electors*, where it was strenuously claimed more authority was given to States as to *electors*, than is given to legislatures to *prescribe* as to the election of *Representatives*.

The language used as to electors reads:

> "Each *State* shall appoint, in such manner as the legislature may direct."
>
> Sec. 4, Art. I, Con. U. S.

And as to Senators and Representatives the language used reads:

> "The times, places and manner of holding elections for Senators and Representatives *shall* be *prescribed in* each State by the *Legislature* thereof."
>
> Sec. 1, par. 2, Art. II, Con. U. S.

It will be observed that the former provision seems to give a State some power to appoint, while the latter does not, but imposes an absolute duty on the legislatures.

MICHIGAN CASE.

Both provisions are given consideration in a Michigan case in which the arguments of counsel and the opinions in both State and Federal courts are replete with the history of both the provisions involved as to their adoption and operation.

The central thing held is that:

> "The question before us is *not* one of *policy*, but of power."
>
> *McPherson v. Blacker*, 92 Mich. 377.
>
> *McPherson v. Blacker*, 146 U. S. 1, 35.

The legislature of Michigan, May 1, 1891, passed an act providing for (in future general elections) the election of

> "electors of President and Vice-President of the United States and a representative in Congress for the *district* to which each of such counties shall belong."
>
> For copy of this Act, see 146 U. S. pp. 4-5.

It will be observed that this Act (Sec. 1) provides for separate districts in which to elect electors and alternate electors at large. This act repealed all other acts and parts of acts in conflict therewith.

McPherson and others claiming to be "nominees for Presidential electors" under a former law of Michigan, filed (1892) a petition in mandamus against the Secretary of State in the Supreme Court of Mich., and

> "praying that the court declare the act of the legislature * * * void and of no effect, and that a writ of mandamus be directed to be issued to the said Secretary of State commanding him to cause * * * a notice in writing that at the next general election in this State * * * there will be chosen * * * as many electors of President and Vice-President of the United States as this State may be entitled to elect Senators and Representatives in Congress."

The notice to the Secretary of State thus sought to have issued was to secure an election of electors at large in conformity to a prior law of Michigan, which required electors to be elected at large.

See copy of prior law, 146 U. S. (7).
Supra, 92 Mich. (380).

It will be noted that the writ sought to have the 1891 act declared *void* both as to the districting for *electors* and *Representatives* in *Congress.*

The Relators claimed

> "the act (1891) was void because in conflict with clause 2 of Section 1, of Art. II of the Constitution of the United States, and with the Fourteenth Amendment to that instrument, and also in some of its provisions in conflict with the act of Congress of February 3, 1887, entitled 'An act to fix the day for the meeting of the electors,'" etc.
>
> (*Supra*), 146 U. S. 24.
> (*Supra*), 92 Mich. 381.

The Supreme Court of Michigan, all the judges thereof concurring, held the 1891 act providing for the election of electors for the State, one for each district, by the voters thereof, was constitutional, save in so far as it undertook to fix the date for the meeting of electors, that being in conflict with the law of Congress; and it denied the writ.

That court held, both in syllabus and in the opinion, that the *Legislature* had the right to require the State to elect electors in separate districts; that such right was an *exclusive* one and could be exercised as often as it chose to act; that the act of 1891 did not conflict with clause 2 of Sec. 1, Art. II, or with the XIV or XV Amendment to the Federal Constitution; and that it was not otherwise invalid.

I will not here quote largely from the case, but only observe that in a summary (pp. 378-380) of Jus-

tice Montgomery's carefully prepared, able and exhaustive opinion, the right, duty and necessity of upholding the conferred legislative power of the State legislature, free from any State, or other interference, is made clear. It is there conclusively pointed out that the constitutionally conferred power given the legislatures of states had long ago received a uniform construction, not to be deviated from because of growth of sentiment, non-user or other cause; that it is only subject to change or modification "by the prescribed methods." Both United States and State cases are cited in support of such construction. (92 Mich. p. 378.)

It is there said (p. 378-c):

> "The practical construction placed upon this section was certainly such as to maintain the contention of the respondent that the contemporaneous interpretation was that *plenary power* was reposed in the legislatures of the several states to prescribe methods for choosing electors other than by a vote of the electors of the entire State, or by any agency which, in the performance of other public functions, represented the entire state."

And see quotations on the same subject from Story and Cooley on the Constitution, pp. 382-3.

And for numerous cases holding a Constitution must be construed as the people construed it at its adoption, see: (same case) pp. 382-3.

And for an able discussion and for supporting authorities on the nature and absolute character of the power conferred on legislatures, as to the manner of choosing both electors and representatives, see (same case) pp. 388-396.

We cannot refrain from copying here the last quotation in the opinion:

> "It is to be remembered that even praise-

worthy objects cannot be rightfully attained by a violation of law. Every effort to fritter away the plain language of the Constitution, by way of construction or otherwise, even to secure a desirable end, is nothing less than an insiduous attempt to undermine the fundamental law of the state, and hence, to that extent, destructive of good government, besides being vicious in its tendencies."

Supra, 92 Mich. (396.)

State v. Cunningham, (Wis.) 51 N. W. Rep. 1135.

We note again and again that such thing as petition or referendum vote to defeat or control the power given to legislatures to "appoint" and "prescribe" the manner of choosing electors was unknown when the Constitution of the United States was framed (1787) or adopted (1789), nor for about one hundred and twenty years thereafter.

This Michigan case was promptly taken to the Supreme Court of the United States and there affirmed, without dissent.

McPherson v. Blacker, 146 U. S. 1.

We quote from the syllabi of the case:

"Under the second clause of Article II of the Constitution, the legislatures of the several states have *exclusive* power to direct the manner in which the electors of President and Vice-President shall be appointed.

"Such appointment may be made by the legislatures directly, or by popular vote in districts, or by general ticket, as may be provided by the legislature.

"If the terms of the clause left the question of power in doubt, contemporaneous and continuous subsequent practical construction had determined the question as above stated.

"The second clause of Article II of the Constitution was not amended by the Fourteenth and Fifteenth Amendments, and they do not

limit the power of appointment to the particular manner pursued at the time of the adoption of these amendments."

Supra, 146 U. S. 1.

The pertinency of each syllabus quoted applies to the power conferred on a legislature relative to redistricting a state for representatives in Congress. The same "exclusive power to direct" as the appointment of electors necessarily exists as to the election of representatives. And discussion is foreclosed by the rule that "contemporaneous and continuous subsequent practical construction" must determine the constitutional question, if it is in doubt. (146 U. S. 1, 24-36). No doubt as to the power of the legislature to redistrict a state has arisen in Ohio for above one hundred years, or, so far as we can discover, in any State since the Constitution went into effect—1789.

See history of such legislation—146 U. S. 26-36.

It must not be forgotten that the Michigan act sought to have declared void provided for representative districts as well as electors.

Chief Justice Fuller, in the opinion, takes more than usual pains to review the whole subject of the power conferred on state legislatures by the Constitution of the United States, including, specially, as to "times, places and manner" of holding elections for Representatives as conferred by Sec. 4, Art. I.

Supra, 146 U. S. 25-35.

He says:

"What is forbidden or required to be done by a State is forbidden or *required* of the legislative power under State Constitutions as they exist. The clause under consideration does not read that the *people* or the *citizens* shall appoint," etc. (p. 25).

He also refers to the fact that the Constitution of

the United States (Sec. 2, Art. 1) provides that Representatives shall be "chosen every second year by the *people* of the several States," and that the general practice was for the State legislatures to require them to be elected by districts, adding:

> "It has never been doubted that Representatives in Congress thus chosen represented the entire people of the State acting in their sovereign capacity." (p. 26).

Also that—

> "It (the Constitution) recognizes that the people act through their representatives in the Legislature, and leaves it to the *Legisiature exclusively to define the method* of affecting the object." (p. 27).

The Chief Justice follows (pp. 27-32) with an historical review of how different State Legislatures have exercised their power to appoint electors, likening such power to that they exercise in providing for the choice of *Representatives*, and he quotes, with approval, from a report of Senator Morton on the subject to show such power is

> "placed absolutely and wholly with the *Legisiatures* of the several States." (p. 34).

Adding:

> "This power is conferred upon the Legislatures of the States by the Constitution of the United States, and *cannot be taken from them or modified by their State Constitutions* any more than can their power to elect Senators."
>
> "Whatever provisions may be made by statute, or by the State Constitutions, to choose electors by the people, there is no *doubt of the right of the Legisiature to resume the power at any time*, for it can neither be taken away or abdicated."

Also adding:

> "From this review * * * it is seen that

from the foundation of the government until now the practical construction of the clause has conceded plenary power to the State Legislature in the matter of appointing electors." (p. 35).

And further:

"The question before us is not one of *policy*, but of *power*," etc.

"The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they might have exercised in some other way * * *."

"Still less can we recognize the doctrine that because the Constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of the framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it." (pp. 35, 36).

Also:

"We repeat that the main question arising is one of *power* and not of policy." (p. 42).

These principles, so emphatically laid down, are each and all applicable and conclusive of a like (or even greater) power granted to Legislatures of States (Art. I, Sec. 4) by the Constitution of the United States. If any difference were possible, it is in favor of an *exclusive power* being vested in State Legislatures in the matter of "prescribing" for the election of "Senators and Representatives," as said Sec. 4 does not vest any right, as to the manner of their election, in the State as does the Section relating to electors.

See both Sections, *Supra*, pp. 3-4.

Could it be possible that a State might have been deprived of its right to choose United States Senators, or that the time, place or manner of choosing them could have been defeated or controlled by a "petition" for a referendum, or by a referendum vote?

> The right is not even reserved to Congress to "make or alter * * * the places of choosing Senators." (Art. I, Sec. 4).

We have abundantly pointed out that, under the Ohio referendum, an Act, initiated and adopted by vote of the people, would not be a legislative Act—certainly not of a "Legislature" (*Supra*, pp. 7, etc.); that such Act is required to be entitled, "Be it enacted by the people of the State of Ohio" by Section 1g, Art. II, Con. of Ohio; that by "petition" alone, by less than six per centum of the voters in Ohio, the power conferred on the "Legislature" by the Constitution of the United States as to the manner of choosing Representatives and electors would be mainly taken away without even a referendum vote.

And the Ohio referendum—(ninety days) prohibition against laws going into effect, would prevent a districting law being passed for the three months *before* electing Representatives to a new Congress. If a State Constitution could thus prevent its Legislature from prescribing the manner of electing Representatives for three months, it could do so entirely.

There certainly can be no right in a State, by its Constitution or otherwise, to suspend for any time the right or power given by the Constitution of the United States.

Other Federal cases might be consulted, not already referred to specifically, which support the exclusive power we maintain exists in State Legislatures.

> *Chisholm v. Georgia*, 2 Dall. 419.
> *Leitensdorfer v. Webb*, 20 How. 176.
> *Ex Parte Seibold*, 100 U. S. 271.
> *In re Green*, 134 U. S. 377.

If referendum applies to Ohio to defeat the power of its Legislature to regulate the election of Repre-

sentatives in Congress, it would necessarily apply to defeat its power as to the appointment of electors. Also to the other instances where power is given by the Con. of the U. S. (quoted, *Supra*, pp. 2-5) to State Legislatures.

But nobody now, in the light of the Supreme Court decisions, would have the temerity to claim such referendum would apply to prevent the Legislature enactng a law relating to the manner of appointing electors. And it must follow that, for the same reasons, referendum can not apply to prevent the Legislature from enacting a law prescribing the manner of choosing Representatives.

A resolution of a State Legislature passed by each House prescribing the manner of electing Representatives, would meet the imperative requirement of the Constitution of the United States, without the Governor's approval. He would possess no right to veto it, nor could it be vetoed by referendum.

It may be asked: When did the redistricting Act of 1915 take effect? The answer is twofold; it took effect on its passage by the Legislature, because then the Legislature had executed its power under the Constitution of the United States; and it could take effect otherwise under the Constitution of Ohio, on its approval by the Governor and "filed with the Secretary of State," and, in the absence of a date being fixed therein, under Section 16, Art. II, Con. of Ohio. The Act does not fix, or need to fix, a date for its taking effect.

It is held, in a California case (1889) that where a power is imposed on the *Legislature* of a State by its Constitution, that, although its *laws* are required to have the approval of the Governor, his approval is not necessary to the exercise of such power.

This language is used:

> "The governor is not, in fact, a part of the Legislature. The Constitution provides: 'The Legislative power of this State shall be vested in a Senate and Assembly.' It will be seen therefore, that the *Legislature* is one thing, and the law making power of the State another."

Adding, as to the matter submitted, that:

> "It provides for the submission to the *Legislature*, which does not include the Governor."
> *Brooks v. fischer*, 21 Pac. Rep. 652-3.

The Constitution of California uses substantially the same language found in the Ohio Con. Art. II, Sec. I. And the term "General Assembly" is held, in a criminal case in Ohio, to mean "*Legislature.*"

State v. Gear, 7 Ohio, N. P. 551.

We state again that referendum is not assailed as applicable (as was doubtless only intended) to State matters; that as to the exclusive power here claimed to be possessed by the Legislature it acts independently for the United States primarily, and generally for the State and its people, because the great "National Charter" so commands.

> "It (the Constitution) recognizes that the people act through their Representatives in the Legislature, and leaves it to the Legislature exclusively to define the method of effecting the object." (146 U. S. 27).

And see, infra, quotations, from reports, etc., pp. 42-46.

It follows that if Ohio's Constitution contained an express provision that no Act of its Legislature should be effective unless approved by a vote of the people it would be in conflict with the Constitution of the United States, and, consequently, *void.* The people of the state cannot (nor the Governor) *veto* an Act of the Legislature on the subject.

FURTHER OBSERVATIONS.

It seems vain to say anything to support an imperative constitutional provision, yet later we will refer to some decisions in the Senate and House of Congress.

The Congress is a creation of the Federal Constitution necessary to a representative government; it never had any State existence; it is the successor of the Continental Congress (one body) under the Articles of Confederation, which first met in 1774; it was a Federal institution in its creation and organization and, by the Constitution of the United States, all power as to its organization was fixed. To permit each State to adopt its own plan of electing the members of Congress would lead to confusion, destroy uniformity and equality in their choice; lead to disparity and consequent dissatisfaction, and largely tend to overthrow the Republic, beside being a flagrant violation of fundamental laws.

To adhere strictly to the Federal Constitution and disregard the referendum is not a repudiation of referendum as a State policy. It may well be enforced as such policy; and it may be doubted whether it was ever advocated as, or intended to be, anything more than that.

The language used in the State Constitution can be fairly construed to only require a referendum in State matters.

The Constitution of Ohio is framed as a charter for the State, made up of such rights only as a State under the Constitution of the United States enjoys exclusively or permissively, when a paramount Federal power is not asserted by Congressional legislation.

We have seen (*Supra*, p. 12) that where a right

may be exercised by both Federal and State authority that when exercised by the Federal government the right of the State ceases.

The people of Ohio never possessed any right to create a Federal Congress or to determine the mode of electing members thereof. In so far as the people have such a right, it belongs to the whole people of the United States. This being true, it follows that the reservation in the Ohio Constitution, reading:

> "but the people *reserve to themselves* the power to propose to the General Assembly laws and amendments to the Constitution and to adopt and reject the same at the polls on a referendum vote."

can have no relation to matters not State and not at any time possessed by the people of the State.

The most that can be said is, that the

> "powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively or to the people."
>
> Art. X, Con. U. S. (Amendment.)

This, we repeat, reserves rights to the *whole people* of the United States. The power is delegated to the United States to provide for a Congress and such power is therefore "prohibited to the States," and cannot be reserved to them "or to the people."

The first Section of the Constitution of the United States provides for and vests all legislative powers granted by the Constitution of the United States in a Congress, composed of a Senate and House of Representatives. Art. I, Sec. 1.

It is also provided that:

> "Representatives shall be apportioned among the several States according to their respective numbers."
>
> Con. U. S. Art. XIV, Sec. 2 (Amendment).

Congress is given the

> "power to enforce by appropriate legislation the provisions of this Article." Art. XIV, Sec. 5.

The same rule of apportionment was in the Constitution of the United States on its adoption (1789). Art. I, Sec. 2.

Among the powers of Congress granted is the right to make all laws necessary to

> "carry into execution * all * powers vested by the Constitution of the United States in the government of the United States, or in any department thereof."
>
> Art. I, Sec. 8 (par. 18).

The right reserved to Congress (Sec. 4, Art. I), in the Constitution of the United States to, "at any time by law make or alter * * * regulations" of State Legislatures as to the "times, places and manner of holding elections for Senators and Representatives," has been frequently exercised by Congress, at least in part.

The last apportionment Act fixed the number of districts in each State. U. S. Stat., 1 Sess, 62 Cong. (1911), p. 13. And this Act and other general laws, also fix the time (Tuesday after the first Monday in each even year) for electing Representatives.

> R. S. U. S. (1878), Sec. 24.
> See Ex Parte Yarborough, 110 U. S. (660-2).

But we have seen (*Supra*, p. 2) that it was left by the last (1911) apportioning Act of Congress to the State *Legislatures* to redistrict the States for the purpose of electing Representatives, and this has accordingly been done.

> It should be observed that there was no referendum in Ohio at the last (1911) apportionment, and none anywhere when the Constitution of the United States went into effect (1789).

The people of the State have no more power to in-

terfere with this legislative redistricting than to make "regulations" or a law changing the apportionment among the States or the time of holding the election of Representatives.

Congress can only look to the legislative redistricting to see whether or not it is called upon to, in the exercise of its reserved power, change or alter it.

In the matter of districting a State for Congressional purposes, the people of the Republic can only speak through State Legislatures.

If, as must be conceded, the people of Ohio cannot create Congressional districts or change or alter existing ones by vote, it is impossible for them to reject an Act of the State Legislature redistricting the State or prevent it going into effect for ninety days or for such or a much longer time by petition of a small fraction of its electors as the plan of referendum provides.

> "The functions of a Legislature must be exercised by it *alone* and cannot be delegated."
>
> 6 Am. & Eng. Ency. p. 1021, n. 6.
>
> *Cincinnati v. Clinton Co.*, 1 O. S. 77.
>
> "The power of the General Assembly to pass laws cannot be delegated by them to any other body or to the people."
>
> (*Supra*), 1. O. S. 77, 87.

It follows that the power exclusively given to the Legislature by the supreme organic law of the United States cannot be either delegated or assumed in any manner by the people of the State of Ohio.

> "Provisions of a State Constitution that are in conflict with those of the Federal organic law will be declared inoperative."
>
> 6 Am. & Eng. Ency. pp. 1079-1080, n. 1.
>
> Cooley on Limitations.
>
> *Dodge v. Woosley*, 18 How. 331.
>
> *Gunn v. Barry*, 15 Wall, 610.
>
> *Gas Co. v. Light Co.*, 115 U. S. 672.
>
> And see below—Congressional Precedents, pp. 33-38.

Each government is sovereign within its own powers.

4 Ency. U. S. Rep. 185, n. 19.
Republic v. Cobbett, 3 Dall, 467, 473.
McCullough v. Maryland, 4 Wheat, 376.

In the instances where (as under Sec. 4, Art I, Con. U. S.) the right is given to exercise a certain power by law, and the right is reserved to Congress "to make or alter such legislation," the latter's failure to act leaves the Legislature with such full power.

4 Ency. U. S. Rep., p. 175, n. 90.
Sturges v. Crowingshield, 4 Wheat, 122.
"Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur."
4 Ency. U. S. Rep. 175-6, n. 91.
Gilman v. Philadelphia, 3 Wall. 713.

CONGRESSIONAL PRECEDENTS.

The principle involved of the right by referendum to control or defeat the power given to State Legislatures has been long settled by the action both of the Senate and House of Representatives of Congress.

(Missouri Cases.)

Long since (1844) the House of Representatives of Congress, through a report of Stephen A. Douglas for a committee, decided that Congress had no power to *require* a State Legislature to create separate districts for its members, but that the Legislature could provide for their election at large, uncontrolled by any authority, unless Congress chose to provide otherwise instead of the Legislature, as authorized by Section 4, Art. I, of the Constitution of the United States.

The report and decision of the House was that Congress possessed no power to compel a State Legislature to prescribe any particular plan for fixing the "times, places and manner of holding elections for Senators and Representatives."

This report concluded by saying, the Constitution —"the great charter,"

> "intended that the regulation of the times, places and manner of holding the elections should be left *exclusively* to the Legislatures of the several States."

subject, only, to independent Congressional action.

Douglas and others in debate insisted that "*Congress* had no power to *district* the States, for that would be to prescribe the qualification of voters as to residence."

1 Hinds' Prec. of H. of R., pp. 170-2, Sec. 309-310.

1 Bart. Con. Elec. Cases, pp. 47, 60.

(In cases last cited are found important history relating to embodying the provisions in question here).

And see like history summarized by Senator Douglas and others, 1 Bart &c, pp. 51-7.

(Iowa Cases.)

The Holmes and other cases arising from Iowa (1880) are to the same effect in denying that a State Constitution cannot control its Legislature in the matter of districting, etc.

1 Hinds' Prec., pp. 667, 672; Sec. 525.

(Virginia Cases.)

One Segar presented (1861) credentials showing his election to the House from the First District of Virginia. It turned out that he was elected in a dis-

trict created by the people in convention and not by a Legislature of the State, though there was one in existence that had not districted the State. It was held that a Legislature being in existence it, only, could district the State.

1 Hinds' Prec. pp. 391-2, Sec. 363.

The Beach-Virginia case resulted in a similar decision in the House.

1 Hinds' Prec. pp. 300-2, Sec. 367.

In the Davidson-Gilbert contest (1901) arising from Kentucky, it was claimed that the legislative redistricting

> "Act was contrary to the State Constitution, and that it had never properly passed the Legislature."

The House Committee dismissed this contention "without discussion, as having no foundation."

It also upheld the Legislature's exclusive right to, as often as it pleased, redistrict or change or alter districts.

1 Hinds' Prec. pp. 180-1, Sec. 313 and p. 672, Sec. 525.

See, also, as sustaining the view that a State Constitution cannot control its Legislature; West Virginia (1873) and Colorado (1877) cases.

1 Hinds' Prec. pp. 659, 653-4, 661-672, Sec. 522, 524.

> Some distinguished statesmen have, with great force, maintained that when a State Legislature prescribes for the election of Senators and Representatives, and also electors, as the Constitution of the United States authorizes, its acts are the Federal laws, not State.

1 Hinds' Prec. p. 172, Sec. 310, 525, u. 24, Sec. 856.

The sole power of the State Legislature is derived

from the Constitution of the United States. The rights involved are not of individuals who may be elected or defeated or of the people of districts or of a whole State, but of the *whole United States.*

(Michigan Case.)

The case of *Baldwin v. Trowbridge* (1866) arose in Michigan, and involved the right of its Legislature to fix the times, etc.; for electing Representatives in Congress, resulted in sustaining such right, both by committee report and the judgment of the House. The report is able, elaborate and conclusive.

II Hinds' Prec. pp. 24-6, Sec. 856.

The Baldwin v. Trowbridge case (*Supra*) is also cited in the same book, p. 240.

Also in Contested Election Cases in Congress (1865-1871), p. 43.

And this language is used:

> "The *Legislature* of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from the Constitution of the State, but this right and power is derived *exclusively* from the Constitution of the United States."
>
> II Hinds' Prec. p. 240, Sec. 947.

(Minnesota Case.)

The memorable Donnelly-Washburn case (1880) from Minnesota, involved the right of a State Legislature to regulate the time, place and manner of holding an election of a Representative, and in the reports thereon the view was upheld that it derived its power "from the Federal and not the State Constitution."

II Hinds' Prec. pp. 230, 238, 240-1, Sec. 945-6-7.

The report cited, ex parte Seibold (100 U. S. 371),

where this right was considered, quoting from the syllabus this:

> "Where there is a conflict of authority between the Constitution and laws of a State in regard to fixing the place of elections the power of the Legislature is paramount."

(Tennessee Case.)

The *Davis v. Sims* case (Tenn. 1904), also involved the question of the exclusive power of a State Legislature to prescribe the time, place and manner of electing Representatives to Congress, and authorities are cited in the report, etc., to support the view that the Legislature possessed such power.

II Hinds' Prec. p. 738, Sec. 1132, and p. 742, Sec. 1133.
Baldwin v. Trowbridge, 2 Bart.
Donnelly v. Washburn, 1 Ells. 495.
McCreary's Law of Elections, 109-112.

(Senatorial Cases.)

The decisions on swearing in persons claiming elections as Senators as prescribed by State Legislatures, are even more emphatic and the members of the Senate are more nearly unanimous in holding that State Legislatures have exclusive power in the premises than the House.

When (1877) John T. Morgan (Alabama) and L. Q. C. Lamar's (Mississippi) credentials were presented and they appeared to be sworn in as Senators, objection was made that in the election the will of the people had been subverted by violence &c., but it was not denied that they had been chosen as prescribed by the *Legislature* of Mississippi.

Morton of Indiana and Dawes of Massachusetts, and other distinguished Senators were then in the Senate. Only one vote was cast against the resolution to swear each in.

I Hinds' Prec. pp. 286-7, Secs. 359, 360.

In the Senate election case of *Lucas v. Faulkner* (W. Va. 1887) it was held:

> "In electing a Senator the State Legislature acts under authority of the Federal Constitution and laws conflicting therewith are *void*."
>
> I Hinds' Prec. p. 841, Sec. 632.

The same Section of the Constitution of the United States provides the like rule for electing Representatives.

Senator George F. Hoar of Massachusetts objected to Mr. Faulkner being sworn, and his credentials and all papers relating to the case were referred to the Senate Committee on Elections.

On December 4, 1887, Senator Hoar, as Chairman, made a *unanimous* report from the committee in favor of seating Mr. Faulkner, which was adopted without division.

This language was used in the report:

> "The Constitution of the United States is the supreme authority, and all provisions or statutes of any State are *void* and of no effect unless they can be construed as not to be in conflict with its provisions."
>
> I Hinds' Prec. pp. 841-3, Sec. 632.

How applicable is this to the Ohio referendum provision? By eliminating referendum from application to prescribing rules for electing Senators and Representatives in Congress it may be valid as to State matters.

See also Harlan (Iowa) Senatorial case in which it was held that a State Legislature in electing a United States Senator must act in its separate houses, and not in joint session.

I Hinds' Prec. pp. 1099-1100. Sec. 844.

We refrain from considering here other like cases and decisions.

(Some Further Opinions, &c.)

In an Oregon case there arose a question as to the construction of Section 4, Art. IV of the Constitution of the United States, which guarantees "every State a republican form of government," and whether referendum could or did take it away. The case went on writ of error to the Supreme Court of the United States, but it was dismissed, that Court holding that the matter of such guarantee was exclusively committed to Congress. The Court did not, therefore, pass on the effect of the Oregon referendum. . The case, however, has much learning in its presentation. It is therein pointed out that legislation by Representatives elected by the people is the distinguishing feature of a republican form of government.

Pac. Telephone Co. v. Oregon, 223 U. S. 118, 124-6.

That the character of our Republic is that of a representative government, and not a pure democracy governed by the people, is there discussed, and distinguished, and authorities, historical and judicial, are largely cited in support of that view. (223 U. S. 120-6). Authorities are cited (p. 121) holding the sovereign power of the States is subordinate to that of the Federal government over its citizens.

Crandall v. Nevada, 6 Wall, 35.
Lane Co. v. Oregon, 7 Wall, 76.
Koehler v. Hill, 60 Iowa, 543.
Story on the Con., Sec. 318.
Elliott's Debates, Vol. V, 239.

"Laws must emanate from the law-making power, and in a Constitutional Republic, that power can only be a representative Legislature created in accordance with the organic law."

Supra, 223 U. S. 122.

It is further logically contended that under our form of government, the Constitution of the United States could not (as well as did not) confer legisla-

tive power on the people of a State, but could only confer it on its Legislature.

The distinction between an oligarchy or a democracy, that is between a representative Republic and a democracy wherein the people made the laws for all, is well defined on the highest authorities. (223 U. S. 123).

We cite only a few of them here:

Downs v. Bidwell, 182 U. S. 279.
Cooley's Con. Lim. 194.
Minor v. Happersett, 21 Wall. 162.
In re Duncan, 139 U. S. 461.
15 Jefferson's Writings, 452.

It is also maintained that a government cannot be said to be representative in which the people at large make the laws, and that the framers of the Constitution recognized the distinction between a representative Republic and a democratic form of government. (223 U. S. 124).

For views of John Marshall, later Chief Justice, see:

3 Elliott's Debates, 225, 233.
Federalist No. XIV.
Hamilton's Works, XI, 101, 103.
5 Elliott's Debates, 136.

And the form of the State governments recognized and perpetuated by the Constitution was "with the three departments in force in all the states at the time of the adoption of the Constitution.

223 U. S., 124.
5 Elliott's Debates, 239.

It has been repeatedly said that legislation by the people is "subversive of the structure of our Republic." (223 U. S. 125, and cases cited).

> "That the Federal Constitution presupposes in each State the maintenance of a republican form of government, and the existence of State Legis-

latures, to-wit; representative assemblies having the powers to make laws; and that in each State the powers of government will be divided into three departments, a legislative, an executive and a judiciary."

* * * * * * *

"State Legislatures are a vital feature of our government; the Federal Constitution presupposes their existence."

* * * * * * *

"Under the Constitution the State Legislatures are the agency to carry on the relations between the Nation and the States."

"The word '*Legislature*' in the Constitution means a representative assembly consisting of *two houses*, empowered to make the law.

"Such was the meaning at the time of the adoption of the Constitution."

223 U. S. 125.

"Words and terms are to be taken in the sense in which they were used when the Constitution was adopted."

Veazie Bank v. Fenno, 8 Wall. 542.
Locke v. New Orleans, 4 Wall. 172.
United States v. Harris, Abb. U. S. 110.
United States v. Black, 4 Saw. 211.
Fox v. McDonald, 101 Ala. 51.
Evansville v. State, 118 Ind. 426, 441.
aBncroft's His. U. S. Vol. IX, 260.

What we contend for here is that as to all matters devolving on a Legislature of a State by imperative mandate of the Constitution of the United States, must be a Legislature organized and endowed with the powers of those existing when (1789), the Constitution was adopted.

* * * * * * *

In this connection we here quote pertinent parts of reports made long since (1842) on the power of State legislatures to exclusively prescribe, under the authority of the Constitution of the United States, the manner, etc., of electing Senators and Representa-

tives, in the famous New Hampshire, Georgia, Mississippi and Missouri cases.

First from the majority report from the committee on Elections, by Mr. Stephen A. Douglas, of Illinois, its chairman.

There arose a question of the power of Congress

> "to instruct the State Legislatures in respect to the manner in which they shall perform their duties."

This language is used by Mr. Douglas:

> "We have searched the Constitution in vain for such a power. The fourth section of the first article certainly does not confer it. That section only vests the power of legislation on this subject primarily in the several legislatures, and ultimately in Congress. The power of the States, in this respect, is as *absolute and supreme as that of Congress*, subject to the proviso that Congress may change or suspend their action, by substituting its own in lieu thereof. The right to change State laws, or to enact others which shall suspend them, does not imply the right to compel the State legislatures to make such changes or new enactments. Whatever power the legislatures possess over elections, they *derive from the Constitution*, and not from the laws of the United States. Congress has no more authority to direct the form of State legislation than the States have to dictate to Congress its rule of action. Each is *supreme* within the sphere of its own peculiar duties; clothed with the power of legislation, and a discretion as to the manner in which it shall be exercised, with which the other cannot interfere by ordering it to be exercised in a different manner."
>
> 1 Bart. Con. Elec. Cases, p. 52.

Turning now to a no less able lawyer and statesman's report (Mr. Garrett Davis, Kentucky) in the same case. we quote:

"The Constitution of the United States forms a government complete in itself. It derives none of its powers from the State governments, but it emanates wholly from a higher source—the people of the United States acting by States; and to conduct its operations, its founders instituted its own *agents*. The legislatures and governors of the States are invested with a few of its powers; but, in the execution of such powers, those State functionaries are as much the *agents of the general government as Congress* and the President are in the fulfillment of their appropriate duties. No branch or officer of the State governments can perform any act whatever in the administration of the government of the United States but by virtue of, and in strict conformity to, some express provision of its Constitution. The power of the State legislatures to pass laws to regulate the election of Senators and Representatives in Congress, and of the governors of the States to fill pro tempore vacancies in the Senate, is derived primarily, *wholly, and exclusively from the federal Constitution*; and, considered simply in the performance of those acts, they are *not agents of the State governments*, but are organs of the government of the United States. In depositing these powers, they are referred to as legislatures and governors of the States, not to obtain any necessary or additional authority to the acts which the Constitution requires them to perform, but only to verify the persons with whom it intrusts certain powers, which could as well have been conferred upon any other officers, State or federal, with precisely the same sanctions in their execution. In testing the validity of any laws of the States relating to the election of Representatives in Congress, and those elections also, we are to look only to the Constitution of the United States."

1 Bart., pp. 56-7.

This last report covered a question of *all the people*

of a State having the right to vote for Senators and Representatives, and Mr. Davis in his report, had much to say on the subject.

* * * * * * *

After quoting two provisions of the Constitution of the United States, to-wit:

> "The House of Representatives shall be composed of members elected every second year by by the people of the several States," etc.'

and

> "The Senate of the United States shall be composed of two Senators from each State, chosen by the legislatures thereof for six years," etc.
>
> (Art. 1, Secs. 2, 3.)

the report proceeds:

> "It has been lately assumed that the clause relating to the House of Representatives establishes the general ticket as the mode by which its members are to be elected; and this strange position it has been attempted to enforce by a more strange argument, deduced from the one concerning Senators. But the argument is this; that the members of the State legislatures cannot be divided into two classes, and the election of a Senator be assigned to each; and as the people of the States are to elect their Representatives, they cannot be divided into districts, and those residing in a district be redistricted to vote for a single Representative, but *all* have the right to vote for *all* the Representatives of the State. If such reasoning be entitled to a serious answer, it may be said that Senators are not to be chosen by the *members* of the State legislatures, but by the *legislatures*; and the body of the two houses must be convened and organized in general assembly to constitute a legislature. On the other hand, Representatives are to be elected, not by the *States*, but by the *people of the States*; and these phrases are to be received as they were uni-

versally understood when the Constitution was formed; and the right created by them may be exercised in the form in which ever since, until the present time, it has been recognized by all. The *people* of the States, respectively, then elected, as they now do, the most numerous branch of their legislatures; yet the whole people never voted for all the members of which it consisted, nor, indeed, for as many candidates. The position that the *House of Representatives must be chosen by all the people* of the several States, would prove too much for the purposes of its advocates."

1 Bart. etc., p. 57.

The report proceeds to show that the fallacy and absurdity of the people of a State having or exercising a reserved right to elect Representatives in Congress by pointing out that the whole people never did or could vote for them; that whatever right they have in the matter, must be worked out through their representative legislative body; and that the doctrine advanced was only "a new born dogma," then coming to expound Sec. 4, Art. 1, of the Constitution of the United States. The report, speaking of the Section, says:

"It is the only provision in the Constitution which expressly establishes and invests *any* authority to legislate upon the subject of the election of Representatives and Senators; and if it do not confer the power to determine whether the members of this House shall be elected by districts or by general ticket, then the State legislatures have no jurisdiction over that part of the matter; and they have continually, from the origin of the government, but without question, usurped it. But the language employed is comprehensive, and does give, as was intended, both to the State legislatures and Congress, ample authority over this subject. If it were true, as has been contended, that the power to regulate 'the manner of hold-

ing elections' does not comprehend that of establishing that they shall take place by districts, or general ticket, how have the State legislatures, at their pleasure, set up the one mode or the other? The Constitution will be searched in vain for any other warrant to them. It will not be seriously contended that the States have an *implied power* to conduct this or any other operation of the general government. The implied powers result from the express; and the *State legislatures* are invested with no express power, from which this important implied one will inure to them. It is strictly of a legislative character. The Constitution provides that 'Congress shall have power to make all laws which shall be necessary and proper for carrying into execution' the powers expressly enumerated and conferred upon it, 'and all other powers vested by it in the government of the United States, or in any officer or department thereof.' If this first clause of the 4th section of Article 1 does not give, *sub modo*, both to the State legislatures and to Congress, the authority to direct that the members of this House shall be elected by districts, or by general ticket, then that regulation belongs to Congress exclusively, as an implied power."

1 Bart. etc., p. 58.

The distinguished authors (Mr. Douglas and Mr. Davis) of these reports did not differ on the question of a legislature possessing exclusive power to provide for the election of Senators and Representatives.

(The South Dakota Case.)

We have seen a most remarkable case, and but one, where the existence of the duty cast on the legislatures of States by the Constitution of the United States, is totally denied; and the case is remarkable in other respects, such as basing the opinion not only on such denial, but on a contested election case in the House of Representatives that, by an overwhelming

vote, repudiated every substantial theory announced by the court in its opinion.

State ex rel. v. Polley, Secy. of State, 26 S. D. 5.

The case involved, petition and referendum, in South Dakota. The decision besides being extraordinary, has no authoritative decisions or precedents to support it.

As the basis of the decision the court say:

> "In the first place, we are of the opinion that *no power* to divide the State into Congressional districts was ever delegated to the legislature of the State by Section 4, Art. 1, of the Federal Constitution."
>
> 26 S. D. (8).

The opinion further states;

> "Power was not delegated to the State legislature or to the State itself to regulate such elections, because the State already, in its sovereign capacity, possessed that power, and the Federal Constitution simply left that power with the State where it reposed."
>
> (P. 9.)

This is in conflict with the decisions and precedents.

See quotations from cases, *supra*, pp. 9-11, 17, 25.

And see 146 U. S. 1.

Also, views of Douglas and Davis, *supra* pp. 43-45.

In the opinion there is cited (p. 11) a case holding the legislature could not alter the places of voting fixed by a State Constitution.

Farlee v. Runk, 1 Bart. Con. El. Cases, 87.

and an Oregon case is cited (11) to same effect.

Shiel v. Thayer, 2 Bart. 349.

Both these cases turned on the right of a legisla-

ture to change a provision in a State Constitution relating to the regulation of *State* elections, the latter case involved the power of a convention, and both cases recognize the exclusive power of the legislature to fix the times and places for holding elections for Representatives in Congress at constituted regular election times and places, as the Constitution of the United States contemplated.

* * * * * * * *

But the Michigan case (1866) *Baldwin v. Trowbridge* (2 Bart. etc. 40), is cited, quoted, and relied on as supporting the decision. That quoted (pp. 11-13), was voted unsound in the House of Representatives, then composed of distinguished men of both parties, by a vote of 30 for, and 108 against. It did not get the party vote in committee or in the House. Two of the large election committee only favored the unsound doctrine. This case is authority against every proposition of importance in the South Dakota case.

1 Hinds' Prec. etc., p. 27, Sec. 856.

What was actually reported on the main question by the distinguished committee, and affirmed by almost four-fifths of the House voting, was that

> "The *legislature* of a State does not acquire its right or power to make a law regulating the manner of holding elections for Representatives in Congress from the Constitution of the State, but this right and power is derived *exclusively* from the Constitution of the United States."
>
> 2 Hinds' Prec., p. 240, Sec. 947.

The Baldwin-Trowbridge case, followed prior judicial decisions and Congressional precedents, and it sustains all we here contend for.

CONVENTIONS.

There has been some confusion, but not actual diversity of views, growing out of admitting new States and, at the same time, electing Representatives as provided on a convention plan where the Congress's Act of admission was accepted as its authority to so elect them. And, similarly, some confusion has arisen over the restoration of States that were in rebellion. There is no occasion for reviewing the cases at length.

In a West Virginia case (43 Con. 1873-4), there arose a question over the power of a State convention to fix the time for electing Representatives.

1 Hinds' Prec., p. 649, Sec. 522.

In this case it was held by the committee on elections that Congress might ratify a State convention.

1 Hinds' Prec., p. 655.

This action "must anticipate the action of a yet to be chosen legislature." The committee quotes and approves this:

> "These cases form exceptions to a rule which is general—that it is the State *legislatures* which apportion their several States for Congressional elections.
>
> "I have failed to find a single exception to that rule, save in case of territories seeking to become States standing substantially on the same footing as territories."
>
> Jameson on Con. Conventions, p. 409.

It was maintained that where a legislature was in existence and had prescribed the time, etc., for electing Representatives, there was no "shadow of authority of a convention to interfere."

1 Hinds' Prec., p. 653.

And it held a convention cannot assume the prerogatives of a State legislature as provided in the Constitution of the United States.

49

1 Bartlett, etc., p. 392.

Sensibly impressed with the gravity of the questions involved in this case, and of the importance of an early decision of it, the foregoing is most respectfully submitted.

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SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

INDEX

No. 15160

In the Supreme Court of Ohio

STATE OF OHIO, ex rel.,
DAVID DAVIS,
Plaintiff,

—vs.—

C. Q. HILDEBRANDT,
Secretary of State, et al.,
Defendants.

Reply Brief for Plaintiff

KEIFER & KEIFER,
SHERMAN T. McPHERSON,
Attorneys for Plaintiff.

The Young & Bennett Press, Springfield, Ohio

No. 15160

Supreme Court of Ohio

STATE ex rel., DAVIS

—vs.—

HILDEBRANDT,

Secretary of State, et al.

REPLY BRIEF FOR PLAINTIFF

It is sugested that mandamus is not the remedy to require the election of officers to hold elections in the districts prescribed by law, because:

1. The question is a political one, and therefore not justiciary.

2. That as the House of Representatives has the right, however this court may decide, to judge of the election and qualification of its members, this court is without jurisdiction.

(1)

To the first of these questions there are several conclusive answers.

The Statute and decisions of Ohio give this court jurisdiction in mandamus to compel the

> "performance of acts which the law has specifically enjoined as a duty of a board, officer or person."
>
> G. C., Sec. 12283.
> *State ex rel. v. Columbus*, 64 O. S. 377.
> *State ex rel. v. Hoglan*, 64 O. S. 532.
> *State ex rel. v. Lea*, 10 O. N. (N. S.) 367.

This authority is not made dependent on whether or not the duty required is political, but the thing sought here is the performance of a legal duty. Mandamus has been frequently used to require the discharge of legal duties.

State ex rel. v. Tanzey, 49 O. S. 656.
State ex rel. v. Kinney, 63 O. S. 304.
State ex rel. v. Brown, 38 O. S. 344.

The Supreme Court of the United States has held that "the validity of a state" law, involving a repugnance to the laws and Constitution of the United States is a proper subject for mandamus.

McPherson v. Blacker, 146 U. S. 1, 23.

The application here involves no discretionary powers of the State and Deputy State Supervisors of Election, but seeks to have them obey the existing law as to the proper district in which delegates, State and district committeemen, and Representatives in Congress shall be chosen.

This is not a purely political question, such as was involved in a recent Ohio case—that of the conduct of public officers in the performance of their duty, such as judging the sufficiency and validity of petitions, etc.

State ex rel. v. Graves, 90 O. S. 311, 318.

It is here sought to require defendants to obey existing law, but says nothing about their discretionary powers in doing so. The case holds that even an abuse of discretion may be remedied by mandamus.

The claim is made that the petition raises a question passed on in a late case.

Pac. States, Etc. Co. v. Oregon, 223 U. S. 118.

We have referred to that case, on other points, in our brief, pp. 39-41. The case holds that as the Constitution of the United States (Art. IV, Sec. 4) provides that Congress shall guarantee to the States a

republican form of government the courts are not charged with that duty; that

> "the judicial power will not be extended so as to interfere with the authority of Congress or of the executive so as to make this guarantee * * * one of anarchy instead of order." (P. 118.)

It is hardly necessary to say that a proceeding to require a State to provide a republican form of government furnishes no question applicable to a proceeding to require public officers to obey a law. But Chief Justice White points out how, in this Oregon case, the law complained of might have been attacked by mandamus, and the action be justiciable.

The assault in the case, the court says, was *"not on the tax as a tax, but on the State as a State."*

The Attorney General has advised us that he has cited *Richardson v. McChesney*, 128 Ky. 363, to support his claim that this court has no jurisdiction to require public officers to obey the law by holding elections under existing law.

That case was brought in mandamus, to determine that the legislature of Kentucky had not, in the exercise of its discretion, provided proper Congressional districts.

There is no possible analogy between it and our case in which election officers are sought to be required to obey a law in holding elections.

If the decision of the Kentucky case was right it only sustains our view that the legislature of a State has uncontrollable power to create Congressional districts.

It holds that,

> "The Constitution of the United States contains no direction to the States on the matter of apportionment of the State into Congressional districts." (P. 363, Syl. 2.)

It also holds (citing many authorities) that a State legislature has a large discretion in making apportionments.

In the opinion it is said;

> "It would be exceeding the power granted us (the court) to undertake to revise or annul a legislative act relating to a subject over which the *Legislature has absolute control.*"

* * * * * * * *

> "There is *nowhere* any limitation upon the power of the Legislature and it would be assuming authority this court does not possess if we undertook to control a co-ordinate department of the government in the performance of a power vested *exclusively* in it."

In the opinion (p. 370) it is indicated that, if necessary, it would hold (what should be conceded) that Congress has no right "to control or supervise the action of State Legislatures."

* * * * * * * *

This case, on being taken to the Supreme Court of the United States, was dismissed (as it had become a "moot case") without indicating any opinion on the right by mandamus to grant the relief sought.

Richardson v. McChesney, 218 U. S. 487.

Many cases are cited in the case holding courts have jurisdiction to determine the validity of apportionment acts. (P. 488.)

(2)

To the second of these questions it may be answered that a case cited (*Supra*), holds mandamus a proper remedy to determine the State law under which Presidential electors may be chosen. (146 U. S. 1, 23.)

The same rule must obtain as to a State law to determine Congressional districts.

The election of Presidential electors is also left to be finally determined by Congress.

Art. XII, Con. U. S.

The Hayes-Tilden Presidential contest (1876) is an example of this.

* * * * * * * *

Acts of Congress Are Not Paramount to the Constitution

With apparent sincerity counsel suggest that Sec. 4 of the Act of Congress (August 8, 1911) supersedes or repeals Sec. 4, Art. I, of the Constitution of the United States, and directs that the States shall be re-districted in the manner provided by law and not as the Constitution of the United States requires.

The Re-districting Act of May 27, 1915, is according to Section 3 of the Act of Congress of August 8, 1911, and as authorized by the Constitution of the United States.

We do not think Sec. 4 of the Act means anything more than to require re-districting according to law made pursuant to the Constitution of the United States. Awkward as the Section may seem to be drawn, it would still be an unnecessarily strained and unwarranted construction of it to hold it took away a power granted exclusively by the Constitution of the United States. If such unnatural construction must be made, it is sufficient to say it is unconstitutional and *void.*

Richardson v. McChesney, 128 Ky. 363.

We are loath to enlarge this memorandum brief, though we cannot refrain from quoting briefly from Chief Justice Fuller's opinion, as he and his associates treat the question as to *electors* as being the

same as that relating to Senators and Representatives.

146 U. S., pp. 26, 27, 34.

He adopts and quotes a report (1874) of Senator Morton, Chairman of the Senate Committee on Privileges and Elections, reading:

> "The appointment of these electors is thus placed absolutely and wholly with the legislatures of the several States. They may be chosen by the legislature, or the legislature may provide that they shall be elected by the people of the State at large, or in districts as are members of Congress, which was the case formerly in many States, and it is, no doubt, competent for the legislature to authorize the governor, or the Supreme Court of the State, or any other agent of its will, to appoint these electors. This power is conferred upon the legislatures of the States by the Constitution of the United States, and cannot be taken from them or modified by their *State Constitutions*, any more than can their power to elect Senators of the United States. Whatever provisions may be made by *statute, or by the State Constitution*, to choose electors by the people, there is no doubt of the right of the legislature to resume the power at any time, for it can neither be taken away nor abdicated,"
>
> 146 U. S., p. 34.

Further from the opinion:

> "The Constitution does not provide that the appointment of electors shall be by popular vote, nor that the electors shall be voted for upon a general ticket, nor that the majority of those who exercise the elective franchise can alone choose the electors. It recognizes that *the people act through their representatives in the legislature*, and leaves it to the legislature exclusively to define the method of effecting the object.
>
> "The framers of the Constitution employed words in their natural sense; and where they are

> plain and clear, resort to collateral aids to interpretation is unnecessary and cannot be indulged in to narrow or enlarge the text."
>
> 146 U. S., p. 27.

Chief Justice Fuller quotes his predecessor, Chief Justice Chase:

> "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the Constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law power is elsewhere reposed."
>
> 146 U. S., p. 25.
>
> *Texas v. White*, 7 Wall. 700, 721.

Keeping still in mind that the law in question, passed May 27, 1915, went into effect unless vetoed or rejected by petition and vote, called referendum, as provided in the Constitution of Ohio; and also keeping in mind that the Constitution of Ohio, if otherwise applicable, operates to prevent the legislature from *prescribing* the manner, etc., of electing Representatives to Congress for three months (ninety days) before a new Congress is elected, without *petition or vote* of the people; also, that through petition alone the right of the legislature can be suspended or annulled for seventeen months before such election without a vote of the people, we here notice certain matters suggested by counsel for circumventing and defeating the operation of the imperative provisions of the Constitution of the United States. We repeat that all questions which might have arisen or might still arise in other States owing to the peculiar language of their Constitutions relating to what constitutes legislative authority are foreign to the question here made.

Nor is it of consequence what other power, if any, in Ohio might enjoy the right to legislate. It has not legislated on the subject. We must deal with the case made. The legislature of Ohio alone, no other authority participating, passed the law in question; it did not require the approval of the people (nor of the Governor, though it had his approval) to cause it to go into effect even under the Constitution of Ohio; it could only be prevented from going into effect under the Constitution of Ohio by a rejecting vote of the people—a veto.

See Brief, pp. 6, 7, 9-11, 28-29.

No such law of the people has been passed; and no question arises in relation to a law of their making or in which they participated in making.

The conflict arises directly between the power of the legislature and the provision of the Constitution of Ohio in taking it away. And no respectable authority holds that this can be done.

See our Brief, pp. 9-11, 15, 18-32, 36-37.

The Constitution of Ohio provides, as follows:

> "The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law; * * *"
>
> Art. II, Sec. 27, Ohio Cont.

This excepts all officers elected or appointed under the Constitution of the United States, as well as the State Constitution.

The only discovered case (26 South Dakota, 5), cited as being in opposition to our contention, we have perhaps said enough about in our Brief, pp. 46-48.

As predicate to the holding in that case it was regarded necessary by the court to deny that the Con-

stitution of the United States conferred any power on the legislatures of the States in the use of the language:

> "The times, places and manner of holding elections for Senators and Representatives shall be *prescribed* in each State by the legislature thereof."
>
> Sec. 4, Art. I.

That court used this language in its opinion:

> "Power was *not* delegated to the *State* legislature or to the State itself to regulate such elections."

Chief Justices Marshall and Fuller and their associate Justices and other Judges and Statesmen concurred in holding this language conferred an imperative and exclusive power on the legislature, not to be interfered with by any authority save Congress, when it chose to itself assume such power.

But the South Dakota case is bottomed on the (Michigan) *Baldwin v. Trowbridge* case (2 Bart. 46), in which every theory advanced by the court was rejected by a vote in the House of Representatives, regardless of party, of 108 to 30. We give here the syllabus in full:

> "Where there is a conflict of authority between the Constitution and Legislature of a State in regard to fixing the place of elections, the power of the *Legislature is paramount.*"
>
> *Baldwin v. Trowbridge*, 2 Bart. 46.
>
> And see our Brief, pp. 47-48.
>
> 2 Hind's Prec., pp. 27, 240.

We may be pardoned, we hope, for noting here that several gentlemen have, inadvertently, we hope, been led to cite this South Dakota case as holding that a State Constitution or laws could take from a Legislature, and exercise, the power granted it by the ex-

press and imperative language of the Constitution of the United States.

Chief Justice Marshall, in a great case relating to commerce, had occasion to say many wise things on the true and safe rules of construing the Constitution and the supremacy of its powers.

Gibbons v. Ogden, 9 Wheat 1 (22 N. Y.).
5 Wheaton's Condensed Rep. U. S. 562.

Speaking of the use of words in the Constitution, he says:

> "As men, whose intentions require no concealment, generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said."

In speaking of grants of power, he says:

> "It would be absurd, as well as useless, to except from a granted power that which was not granted—that which the words of the grant could not comprehend."

Again:

> "That, although, as to all those grants of power which may be called aboriginal, with relation to the Government, brought into existence by the Constitution, they, of course, are out of the reach of State power; yet, as to all concessions of powers which previously existed in the States, it was otherwise."

Again:

> "The nullity of any act, inconsistent with the Constitution, is produced by the declaration, that the Constitution is the Supreme law."

The Chief Justice, by way of caution against persons construing away the powers of the Constitution who would usurp them, concludes his opinion thus:

> "Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union, are to be contracted by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding, as to obscure principles, which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case, it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined."
>
> *Gibbon v. Ogden*, 5 Wheat Con. Rep. 583.

Do these axiomatic views of the great Chief Justice and the agreeing Associate Justices comport with the views of a court (South Dakota) holding that the plain language used in the Constitution conferred no power whatever on the Legislatures to prescribe apportioning laws for the election of Representatives?

> For general rules of construction, see Brief, pp. 11-15, 23, 41.

We cannot refrain from acknowledging the kindly compliment to one of the counsel—the Senior in years —for the petitioner, though made by way of accounting for his present views. They say, in effect, he was born early enough to have become imbued with views of the Constitution of the United States held by its makers and its early expounders, and too soon to keep pace with progress and modern knowledge of the meaning of that instrument.

He is thus classed with others who were born much

earlier than he was, and, consequently, as counsel seem to believe, much too early to know the meaning of the imperative and plain language used in our great Charter of Liberty. Among these, so denominated, obsolete expounders are Chief Justice John Marshall, Justice Joseph Story and their associate Justices of the Supreme Court who spoke on the subject under consideration one hundred years ago (1 Wheaton 304), and Daniel Webster and others of the greatest Constitutional lawyers and statesmen of any country and age. (Story and Webster were each born about the birth of the Constitution, and were in touch with its framers.)

Through the period of installing and enforcing the Constitution they were charged with the supreme duty of understanding it in all its bearings to carry out its purposes, and to harmonize its parts to secure a permanent representative Republic.

Their views as to the manner of electing Representatives in Congress have obtained, and have been continuously concurred in. The classification does not stop with these earliest expounders of the Constitution.

Passing over many decisions in courts and in Congress on the question involved, and not stopping to name all the great concurring jurists and statesmen, who were, as counsel claim, born too soon to have proper comprehension on the subject, such as Benton, Clay, Douglas, Garret Davis, Morton, etc., we come to a more modern class, like Senators George F. Hoar, Dawes, Cooley, and others who were charged with practically deciding the question of electing Senators and Representatives; and we pass these over also to come to a still more modern class of jurists who spoke in the solemnity of their judicial positions in the highest courts, Federal and State, of the land, but are

claimed to have been born too soon to have knowledge.

Chief Justice Fuller and Justices Field, Harlan, Gray, Blatchford, Lamar, Brewer, Brown and Shiras concurred (1892) in deciding the precise question under consideration, and they then defined what constituted a State legislature and the exclusiveness of the powers granted to it by express and imperative provisions of the Constitution of the United States, and they, also, with other courts and the houses of Congress, held State Constitutions could not take away such powers. (146 U. S. 1.)

This comparatively modern decision followed the earlier decisions as well as the plain natural meaning of the words used in the Constitution. Up to this time there does not appear to be a dissenting judicial opinion or authoritative report on the question.

In our Brief we cited some only of the cases, pp. 19-28, 31-33.

Also Congressional Precedents, pp. 33-38, 42-46.

KEIFER & KEIFER,

SHERMAN T. McPHERSON,

Attorneys for Plaintiff.

SUBJECT INDEX.

Supreme Court of the United States.

THE STATE OF OHIO, ex rel DAVID DAVIS,
Plaintiff in Error,

No. 987. *vs.*

CHARLES Q. HILDEBRANT, Secretary of State, et al,
Defendants in Error.

Reply Brief.

Defendant's brief reached us May 23, 1916, a day after this case was submitted to this court pursuant to its direction.

It contains nothing specially new, hence we only note what we deem and have shown to be patent fallacies. No new authority is cited.

On p. 4 it is asserted that Section 4, Article I, Constitution of the United States, refers to the legislative power of the State as fixed by the State Constitution." This is only true provided the "legislative power" is "*the Legislature thereof.*" And Ohio's Constitution states (Sec. 1, Art. II) that:

"The legislative power of the State shall be vested in a General Assembly consisting of a Senate and House of Representatives."

We have shown its enactments become laws without referendum approval.

Brief, pp. 55-56.
Secs. 1*c* and 16, Art. II, Con. of Ohio.

Counsel rests his contention largely on the claim that Congress possesses the power, notwithstanding the Federal Constitution to the contrary, to authorize States to make redistricting laws for Representatives in Congress otherwise than by their Legislatures. Ohio has but one Legislature, and it passed the law in question without any referendum participation; and it can pass no law with referendum, participating; and referendum is not required to approve a law of the Legislature, before it goes into effect. If referendum, acting independently of the Legislature can pass a redistricting law which may go into effect, it has not done so in Ohio; and it would not be an act of the Legislature.

Brief, pp. 16, 57, 58.

Nor does an Ohio referendum law go into effect on the approval of the Legislature. Counsel (pp. 10, 16, 28), talk much about the Act of Congress (Aug. 8, 1911), and say that Legislatures must act by law, etc. Of course they do, and unrestrained by any outside agency or referendum veto power.

As to the Governor's right to veto a districting law for Congress it will be met when the question arises.

See authorities, Brief, p. 56.

Under the head of "*Argument*" (p. 8) counsel attempts to deny that Section 4, Article I, Federal Constitution, means what it says, and he says, "the authority is given to the legislative body as a body," etc.

Granted; this excludes any outside agency; certainly such rejecting outside agency as referendum is, in no possible sense, a part of the Legislature. Counsel (same p.) say, Sec. 2, Art. I, Con. U. S. "refers to the most numerous branch of the State Legislature," and he pretends to find authority showing the framers of the Constitution did not know that Legislatures had, at some time, consisted of less than two bodies; that the "Continental Congress consisted of but one body," etc.

The Constitution of the United States was adopted to get rid of all one-body Legislatures, Continental Congress included.

This Section 2 conclusively shows the framers of the Constitution only recognized and regarded two-body Legislatures. We have shown that such Legislatures were existing or regarded as existing in all the States when the Constitution was adopted.

Brief, pp. 40-1, 49.
Pac. Tel. Co. v. *Oregon*, 223 U. S. (125).

But, suppose a one-body Legislature was authorized by Section 4, Art. II, Constitution of the United States, to prescribe Congressional districts, was it void, and did it leave referendum—no Legislature or legislative body at all—the right to veto any law passed by any kind of a Legislature or legislative body?

The argument is far fetched (p. 10) that because Congress (1787), before the Constitution of the United States was adopted, provided a Legislature for the Territory North West of the River Ohio, consisting of a "governor,

legislative council and a house of representatives" that said Sec. 4 must be held to include referendum, then unknown, or *anything* else than a State Legislature. But this territorial Legislature consisted of *two bodies*; and elsewhere in the ordinance the governor is shown not to be a legislator, but a governor with veto power.

Counsel say (p. 12):

> "Sec. 4 of Art. I * * * refers to the power in the State which exercises the function of legislation."

This need not be disputed, but such "power in the State" does not include an outside rejecting agency which had nothing to do with exercising *"the function of legislation."*

The 26 South Dakota case counsel say (p. 12), "is really in point," though it holds (pp. 8, 9):

> "no power to divide the State into congressional districts was ever delegated to the Legislature by Sec. 4, Art. I, of the Federal Constitution," * * * or "to the State itself to regulate such elections," etc.

We have sufficiently considered that case.

Brief, p. 37.

The claim (p. 13) that constitutions, "in the main," only lay down "broad general principles," if sound, can have no application to plenary mandatory provisions specifically conferring *power*.

That said Section 4 confers the only power State Legislatures possess for prescribing "times, places and the manner" of electing representatives to Congress is plain, and the authorities in this court and other courts, and congressional precedents uniformly so hold.

Brief, pp. 19-36, 56-7, 62-70.

Counsel again (p. 15) recur to the 1911 apportionment act, repeating the claim that it supersedes the Constitution of the United States as to the right and powers of Legislatures, and gives the right to States to otherwise pass redistricting laws, such right being conferred by the use in the act of the words:

> *"In the manner provided by the laws thereof."*

There was not in 1911, before or since that date, any law of Ohio providing "by the laws thereof" the *"manner"* of electing representatives in Congress. And Congress never possessed any power to confer on State Legislatures any authority to district a State for representatives in any manner.

We have fully discussed this 1911 apportionment Act; also made clear, we think on the highest authority, that Congress can not provide the manner State Legislatures may prescribe the "times, places and manner" of electing representatives in Congress, but must itself, by law, prescribe, if not satisfied with the acts of legislatures.

See Brief, pp. 62-73.

And this view renders it unnecessary here to comment on a large part of counsel's brief (pp. 15-24), made up of loose, inconsiderate remarks, found in the Congressional Record, to the effect that by striking out the word *"Legislature"* in the apportionment act, and using the language, as to the manner of redistricting States, put in it, the provision of the Constitution of the United States, would be anuulled, and any other agency might become operative. We have said something on this subject.

Brief, pp. 28-91, 64-71.

That *referendum* is not republican in form we have sufficiently pointed out, we think.

Brief, pp. 39-53.

Finally, counsel (pp. 24-25) modestly suggest the Ohio court should be reversed in holding (syl. 4, R., 20), that this case was justiciable. He, however, cites some of the case we have cited in our Brief (pp. 50-3), holding it *is* justiciable.

The 146 U. S. (p. 1) case, is squarely in point and, with others, never overruled.

The Oregon case (223 U. S., 118), was against a State alone, and Chief Justice White clearly distinguished it from a case involving individual rights.

The State case (128 Ky., 363), does not hold the matter of requiring official boards relating to elections non-justiciable. It holds, the principle we contend for here, that the Legislature of Kentucky had the right to prescribe congressional districts in such manner as it pleased, and courts had no judicial power to review it.

Brief, p. 50.

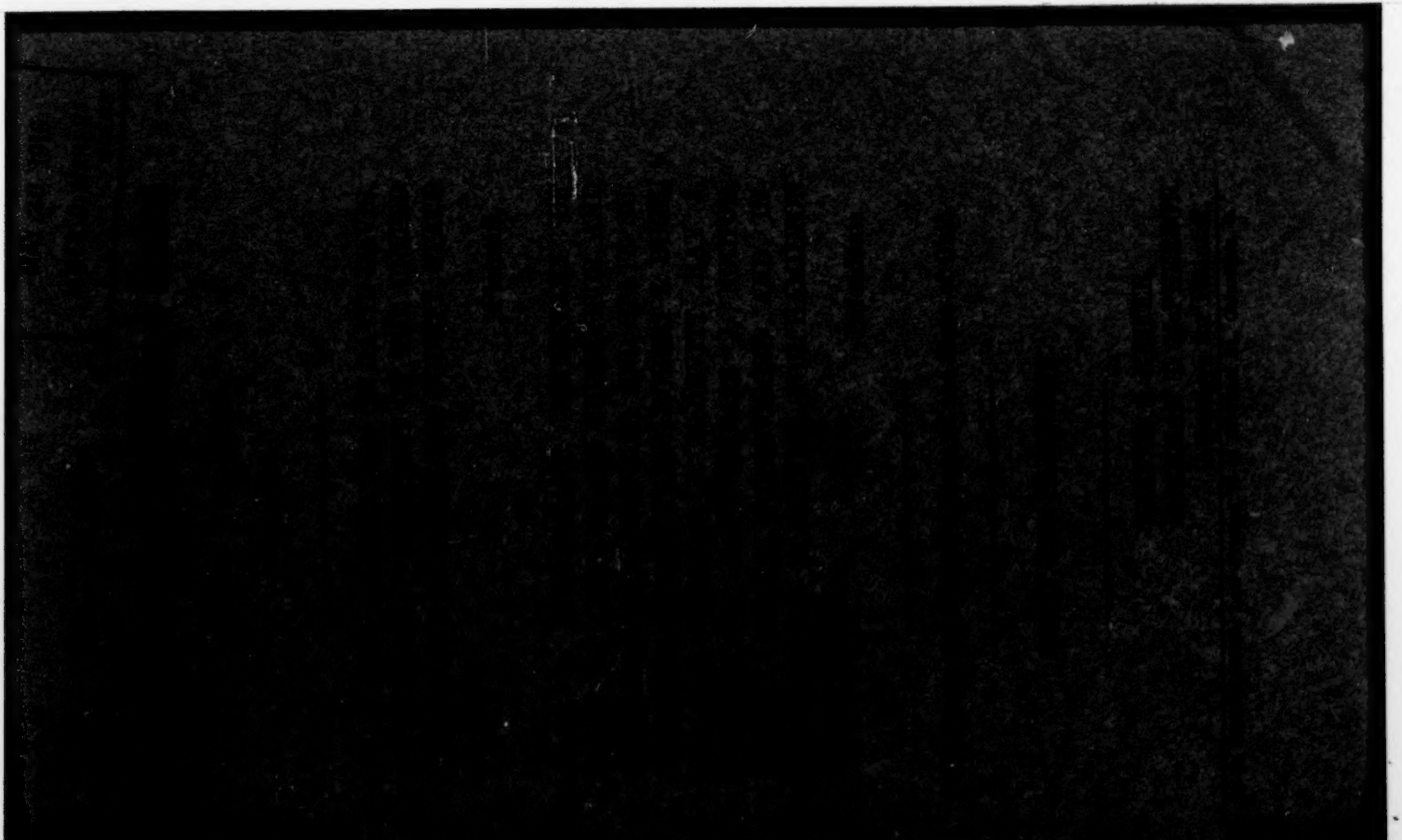
And this court (218 U. S., 187), entertained jurisdiction in the same case, but dismissed it because it had become a moot case. We have reviewed these cases and cited many others sustaining the justiciary character of this one. Brief, pp. 50-53.

Respectfully submitted,

KEIFER & KEIFER,

SHERMAN T. MCPHERSON,

Attorneys for Plaintiff in Error.



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IN THE

Supreme Court of the United States

October Term 1915.

No. 987.

STATE OF OHIO ON RELATION OF DAVID DAVIS, A CITIZEN AND RESIDENT OF THE UNITED STATES AND OF HAMILTON COUNTY, STATE OF OHIO,

Plaintiff,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS; ROBERT Z. BUCHWALTER, WILLIAM J. McDEVITT, RAY J. HILDEBRAND, AND THOMAS J. NOCTOR, DEPUTY STATE SUPERVISORS AND INSPECTORS OF ELECTIONS FOR HAMILTON COUNTY, OHIO,

Defendants.

BRIEF FOR PLAINTIFF.

THE CASE.

This action was brought originally in the Supreme Court of Ohio to require the Secretary of the State of Ohio as state supervisor and inspector of elections and

state supervisor of elections and Robert Z. Buchwalter and three others, deputy state supervisors and inspectors ol elections for Hamilton county, Ohio, to provide for and hold elections for representatives in Congress and to otherwise perform their duties as such official as required by law, they having refused on demand to perform them.

The original petition states the duties devolving on the defendants and the relief sought.

Record, pp. 13-17.

No issues of fact have arisen in the action. A demurrer was filed for the secretary of state.

Record, p. 18.

The other defendants, deputy state supervisors and inspectors of Hamilton county, Ohio, whose jurisdiction and duties relate to the First and Second Congressional Districts of Ohio, answer jointly, admitting the allegations of fact in the petition.

Record, p. 19.

The case was heard on the pleadings for final decision by consent, waivers, etc., and a final judgment was entered refusing the writ of mandamus prayed for, etc.

Record, p. 11.

For assignments of error in this court, see:

Record, pp. 4-6.

They all relate to the merits of the action. No serious question of the right of plaintiff to maintain the action has been made.

We take the liberty of referring to our opening and reply briefs in the Ohio court, designating them respectively Brief (S. C. O.), and **Reply Brief,** (S. C. O.).

QUESTION.

The general question to be determined is:

Was the redistricting act of the Ohio legislature annulled by petition, or by referendum vote, as provided in the constitution of Ohio?

And this involves the applicability of referendum (if valid as a constitutional provision) to reject said act; also whether **referendum**, as provided for in the constitution of Ohio, is **"republican in form"** and constitutional.

OHIO LEGISLATION.

The legislature of Ohio passed, April 28, 1913, an act suppplemental to Sec. 4828, G. C., called Sec. 4828-1, which divided the state of Ohio into 22 congressional districts.

Ohio Laws (1913) Vol. 103, p. 568.

The legislature of Ohio passed, May 27, 1915, an act amending and repealing said Sec. 4828-1 (the 1913 act) and divided the state into 22 congressional districts, differing in boundaries from the 1913 act.

Ohio Laws (1914-1915) Vol. 106, p. 474.

Both acts created districts according to the act of congress "for the apportionment of representatives in congress among the several states under the thirteenth census." (1910.)

U. S. Stat. 1, Sess. 62 Cong. (passed Aug. 8, 1911), Sec. 3.

A referendum vote, held November 2, 1915, rejected the 1915 act, which annulled it and left the 1913 act in effect if referendum could apply to it. If referendum was not applicable to either act, then the 1915 act is in force.

Repeal of the former act was proper but not necessary as the right to prescribe the time, manner, etc., of electing representatives to congress is a continuous one, the latest act being operative, like rules for a legislative body.

II Hinds' Prec., p. 25.
U. S. v. Ballin, 144 U. S., p. 5.

FEDERAL CONSTITUTIONAL PROVISIONS.

The constitution of the United States grants power to state legislatures thus:

> "The times, places and manner of holding elections for senators and representatives shall be prescribed in each state **by the legislature thereof**; but the congress may at any time by law make or alter such legislation, except as to the place of choosing senators."
>
> Art. I, Sec. 4, Con. U. S.

The constitution of the United States also provides:

> "Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed."
>
> Art. XIV, Sec. 2.

There are other instances where the constitution of the United States confers special rights on state **legislatures**, and they serve to show that Sec. 4, Art. I, confers an exclusive **right.**

Art. II, par. 1 (relating to presidential electors), reads:

> "Each state shall appoint, in such manner as the **legislature** thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress."

Art. I, Sec. 8 (par. 11), requires, before sites for forts, etc., are purchased:

> "**Consent** of the **legislature** of the state in which the same shall be, for the erection of forts, magazines, and arsenals, dockyards, and other needful buildings."

Art. IV, Sec. 4 (relating to the U. S. protecting states from domestic violence), reads:

> "Shall protect each of them against invasion, and on application of the **legislature**, or of the executive (when the legislature cannot be convened) against **domestic violence.**"

Art. V, relating to congress calling conventions to amend the constitution of the United States and to ratifying amendments, reads:

> "On application of the legislature of two-thirds of the several states, shall call a convention for proposing amendments, which * * * shall be valid * * * as parts of the constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as * * * may be proposed by congress."

Art. VI declares:

> "The constitution and laws of the United States * * * shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

Sec. 3, Art. II, required:

> "Senators from each state, chosen by the legislature thereof."

This was (1913) amended (Art. XVII) requiring their election by the people.

FEDERAL STATUTES.

U. S. statutes require representatives to be elected in separate districts composed of contiguous territory.

R. S. U. S. (1878), Sec. 25.
Now U. S. Statutes (passed Aug. 10, 1911).
Sec. 3 (62 Cong.), p. 14.

Representatives are required to be elected the Tuesday after the first Monday of November in even numbered years.

Sec. 24 R. S. U. S.
G. C. (Ohio) Sec. 4828.
Present Stat. U. S. (1911) Sec. 14, p. 14.

These provisions contemplate redistricting by state legislatures.

For reference to the foregoing U. S. laws, see:

Ex parte Yarmouth, 110 U. S. p. 660-1.

REFERENDUM—CONSTITUTION OF OHIO.

The constitution of Ohio, as amended (Sept. 12, and took effect Oct. 1, 1912), for the first time, provides, by petition, for a referendum vote on laws passed by the legislature of the state. It reads, in part:

> "The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general as-

smbly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly, except as hereinafter provided; and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls."

Art. II, Sec. 1, Con. of Ohio.

A referendum vote can be had on a law only after petition signed by:

"Six per centum of electors * * * filed within ninety days after any law shall have been filed by the governor in the office of the secretary of state."

Art. II, Sec. 1c, Con. of Ohio.

This six per centum is based on the number of votes cast at the preceding governor's election. (Art. II, Sec. 1g.)

The exceptions from petitions and referendum are:

"Laws providing for tax levies, appropriations for the current expenses of the state government and state institutions and emergency laws necessary for the immediate preservation of the public peace, health or safety."

And such laws must pass on a two-thirds, yea and nay vote, of all members of the general assembly.

Art. II, Sec. 1d.

But first we submit that the language of Sec. 4, Art. I, constitution of the United States is supreme as to the power it grants to legislatures, and that its meaning has not changed.

RULES OF CONSTRUCTION.

The constitution of the United States is supreme whenever it speaks; and certainly as to matters relating to its own organization and existence.

Con. of U. S., Art. VI (original).
Ex parte Seibold, 100 U. S. 371, 10-11, pp. 298-9.
Ex parte Yarborough, 110 U. S. 651-2, 658, 661.

The following are some authoritative constructions of the constitution of the United States and the powers thereunder, important in determining the main question here involved.

The **consequences** of a constitution or law should be taken into consideration in construing it.

Slaughter House Cases, 16 Wall, 36, 78.
4 Ency. U. S. Rep. p. 50, par 12, and n. 83.

"Constitutional mandates are imperative. The question is never one of **amount,** but one of power. The applicable maxim is "obsta principiis," not "de minimis non curator lex." And so whenever a particular object is to be effected, the language of the constitution is always imperative," etc.

Fairbanks v. U. S., 181 U. S. 283, 291.
4 Ency. U. S. Rep. p. 50, par. 12, and p. 83.

"The constitution is a written agreement. As such its meaning does not alter. That which it meant when adopted it means now."

4 Ency., U. S. Rep. p. 36, par. 3, n. 39.
Scott v. Sanford, 19 How. 393, 426.
McPherson v. Blacker, 146 U. S. 1, 36.
Parker v. Loan Co., 158 U. S. 601, 621.
South Carolina v. U. S., 199 U. S. 437, 448.

"Courts must look to the history of the times and examine the state of things then existing when it

(the constitution) was framed and adopted in order to correctly interpret its meaning."

4 Ency., etc., p. 37, n. 41.
R. I. v. Mass., 12 Peters, 657, 723.

So as to contemporary exposition.

4 Ency., etc., pp. 37-8, n. 43.

"When called on to construe and apply a provision of the constitution of the United States we must look not merely to its language, but to its historical origin," etc.

Missouri v. Illinois, 180 U. S. 208, 219.

A state is described and defined—"a government under which the people live, etc."

Texas v. White, 7 Wall, 700.

See, as to constitutional limitations of states—

4 Ency., etc., p. 138-9, n. 61.
Barron v. Baltimore, 7 Pet. 243.

The constitution of the United States renders **void**, and **annuls whatever is done in opposition to it.**"

Poole v. Fleeger, 11 Pet. 185, 212d.

"If the power of a state and that of the federal government come in conflict, the latter must control, and the former must yield."

Cummings v. Chicago, 188 U. S. 410, 428.
4 Ency., etc., p. 180.

"The language of the constitution is **imperative** on the **state legislature**, to make laws **prescribing** the times, places and manner of holding elections for senators and representatives, and for the electors of president and vice president."

Martin v. Hunter, 1 Wheat 304.
And see congressional precedents, below pp. 33-38.

* * * * * * * * *

The manner of choosing senators and representatives was one of the numerous compromises and concessions to the states, but conditioned on its being satisfactorily exercised. It is said that

> "Perhaps the safest rule of interpretation, after all, will be found to be to look to the nature and objects of the particular powers, duties, and rights, with all the light and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed."
>
> **Prigg v. Penna.**, 16 Pet. 540, 610.

> "Words and terms are to be taken in the sense in which they were used when the constitution was adopted."
>
> Supra, 223 U. S. 125-6.
> **Veazie Bank v. Fenno**, 8 Wall. 542.
> **Locke v. New Orleans**, 4 Wall. 172.
> **United States v. Harris**, Abb. U. S. 110.
> **United States v. Black**, 4 Saw. 211.
> **Fox v. McDonald**, 101 Ala. 51.
> **Evansville v. State**, 118 Ind. 426, 441.
> Bancroft's His. U. S. Vol. IX, 260.

It is highly significant that the great chief justices and all other of the immortal galaxy of justices of this court have concurred in holding that the words of the constitution of the United States expressed aptly and clearly the meaning they were intended to convey; and that their meaning continues unchanged. Justice Story seems to have lead off (1816) (1 Wheat 314), Marshall, C. J., concurring (9 Wheat 1); Chase, C. J., followed (7 Wall, 721); Waite, C. J. (88 U. S. 171) and Fuller, C. J. (146 U. S. 1) still followed, all other justices of this court concurring in each case.

And, concurring in the same view, were Webster, Clay, Benton and Garrett Davis; also Douglas, Morton,

Dawes, George F. Hoar, who were, respectively, chairmen of election committees of congress. Speakers Reed and Carlisle and others prominent in congress may be added as of like view.

There seem to have been no real dissenting views of judges or statesmen, regardless of political parties.

And see for some pertinent quotations and citations:

Brief (S. C. O.) 12-14, 39-42.
Reply Brief (S. C. O.), 6-8, 9-13.

In an address of the late Justice Lurton he aptly remarks on the unwisdom of disregarding settled construction of our constitution and laws, and the danger, in doing so, of overthrowing our "American commonwealth." He adds that such course **"is a substitute of men for a government of law,"** and "affords opportunities to whittle away broad economic principles * * * which have long received the sanction of statesmen and the approving recognition of a long line of jurists." (237 U. S. ix-x.)

LEGISLATURES POSSESS POWER TO PRESCRIBE MANNER OF ELECTING REPRESENTATIVES IN CONGRESS UNAFFECTED BY REFERENDUM.

But for Sec. 4, Art. 1, Con. U. S., the state legislatures would have no authority relating to the manner of electing senators and representatives in congress, as the state, nor the people thereof, never possessed any authority relating to the organization of the congress of the United States.

Referendum, if constitutional, cannot be used to overthrow express powers derived solely from the constitution of the United States.

Referendum was unknown when the constitution of the United States was (1789) adopted. Referendum is, in no way, a part of the legislative power of the United States. No law of the Ohio legislature requires an approving vote of the people. By a vote of the people, through the **initiative**, a measure which the legislature refuses to pass may become a law by a vote of the people, entitled, **"Be it enacted by the people of the state of Ohio."**

Art. I, Sec. 1b, 1g, Con. of Ohio.

An act of the legislature is styled: **"Be it enacted by the General Assembly of Ohio."** Art. II, Sec. 18.

The reservation (Sec. 1, Art. II), to the people of the state to reject laws passed by the legislature, cannot be held to reserve to them rights they never had; and rights reserved to the states or the people by the constitution of the United States, are rights possessed by all the states or all the people thereof.

Arts. IX and X, Con. U. S.

The right to create or participate in creating the congress is necessarily vested absolutely in the United States.

Con. U. S. Art. I, Sec. 1.

Referendum, in Ohio, is in the most absolute form. It, however, does not have anything to do with enacting a law by the legislature. It is only to be used to **reject** a law passed by the legislature which would otherwise go into effect. A referendum vote is in no case required to approve a law thus enacted before it goes into effect.

Con. of Ohio, Art. II, Secs. 1 and 1c.
Supra, p. —.
(**Petition** alone takes away legislative power.)

And the so-called referendum sections undertake to prevent a law enacted by the legislature from going into effect for ninety days after its passage, and, by petition, prevent its going into effect at a next succeeding congressional election, without a vote thereon, if passed within seventeen months of such election, thus, practically preventing the legislature from prescribing for the election of representatives within a reasonable time before such election. See on this:

Brief (S. C. O.) pp. 7-9.

(There is but one legislature of a state and it acts alone.)

Strictly speaking the **prescribing** required by Sec. 4 Art. 1 of the constitution of the United States, is not a law in the ordinary sense; especially not a law of the state; it is the discharge of a delegated federal duty or power, often called a federal act, the same as if passed by congress under the same provision of the constitution of the United States. In the absence of that provision neither the legislature nor the people of the state would have any authority in the premises.

The matter of electing senators was provided for in the same article (1) and section (4) of the constitution of the United States, and in the same language. There was as much right for the people, through referendum, or otherwise, to interpose and assume to regulate or elect senators as representatives.

The supreme test as to the application of the Ohio referendum, either by petition or by vote of the people is, whether or not it would control or tend to control, limit or tend to limit or govern the legislature of Ohio in performing its duty and in exercising the power absolutely imposed on it by the constitution and laws of

the United States. If, in any way, such referendum would have such effect, it is wholly inapplicable, as are all state constitutions and laws having such effect.

If the constitution of Ohio, or a law passed in pursuance thereof, directly and expressly provided that the legislature of Ohio should not obey the constitution of the United States and the laws thereof relating to redistricting the state for congressional purposes and as to fixing the times, places and manner of holding elections for representatives in congress, etc., save as directed by the vote of the people of Ohio, everybody would, at once, agree such provision was **void.**

In line with our contention it is held that jurisdiction conferred by the constitution of Ohio cannot be taken away by the legislature.

Randall v. State, 64 O. S. 64.

"What cannot be done directly cannot be done indirectly."

It is easy to show, conclusively, that the referendum, if applicable, would operate exactly as the suggested provision would.

If the Ohio referendum was applied to a redistricting act the congressional apportionment would have to be made for a new congress long enough before the representatives were required to be elected thereto to enable the redistricting act to be passed.

The only question here is—can an act of the legislature of Ohio providing the manner of electing representatives to congress be vetoed by a vote of the people of the state?

Referendum amounts to nothing more than a veto.

We submit that the veto of the governor is not required to make valid an act of a legislature prescribing the manner of electing representatives in congress.

We believe a resolution by the legislature prescribing the congressional districts of Ohio would be amply sufficient to meet the requirements of the constitution of the United States, and form what clearly indicated the will of the legislature, would be sufficient, and we do not believe such an act of the legislature, whether prescribed in the form of a law or resolution would require the signature of the governor. (See Brief (S. C. O.) pp. 27-8.)

In our opinion the people of the state can, in no sense or at any time, under any circumstances be called the legislature as contemplated in the constitution of the United States.

The question here involved is supported by views of the most distinguished jurists and statesmen of this country for more than one hundred years.

In the Massachusetts convention of 1820 to revise its constitution a resolution was submitted to provide for the election of members of congress in such districts "as the legislature shall direct," which would have been a limitation on its power granted by the constitution of the U. S.

In the discussion which followed, Justice Story, a member of the convention, declared that the resolution

> "assumes control over the legislature which the constitution of the United States does not justify. It (the legislature) is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion. In my humble judgment, and I speak with great deference for the convention, it is a direct and palpable infringement of the constitutional provision to which I have referred."

Justice Story was followed by Daniel Webster, also a member, who declared that

> "Whatsoever was enjoined on the legislature by the constitution of the United States, the legislature was bound to perform, and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution."
>
> 1 Hinds' Prec. p. 653.

Of course, the proposition failed.

Justice Story had (1816) delivered the opinion in 1 Wheat, 304, on the same question, and both he and the great constitutional lawyer, Webster, never had occasion to change their opinion that nothing in a state constitution could interfere with the right given to the legislaure of the state by Sec. 4, Art. I, Con. of the U. S.

And nothing is better grounded in sound principle and right reason and better settled by authority than that where a power is solely conferred, whether personal, judicial or legislative, no interference with its independent exercise is tolerated or permitted.

FEDERAL AND STATE DECISIONS.

The question of the power granted to a state legislature to exclusively "prescribe" the

> "times, places and manner of holding elections for senators and representatives in congress."

also presidential electors, etc., has been frequently determined judicially, and in each branch of congress.

> We have quoted or referred to the several provisions of the constitution of the U. S. granting power to state legislatures, supra.
>
> And we, for obvious reasons, disregard here the recent amendment to the constitution of the U. S.

providing for the election of senators by the people of each state, save as a national example of the necessity to change the power granted state legislatures by amending the constitution of the U. S. (Supra.)

We call attention to cases already cited showing the exclusive right given to state legislatures to prescribe the manner, etc., of electing representatives.

The whole question was considered and decided in a Michigan case involving the choice of **electors**, where it was strenuously claimed more authority was given to states as to **electors**, than is given to legislatures to **prescribe** as to the election of **representatives**.

The language used as to electors reads:

"Each **state** shall appoint, in such manner as the legislature may direct."

Con. U. S. Art. II, Sec. 1, par. 2.

And as to senators and representatives the language used reads:

"The times, places and manner of holding elections for senators and representatives **shall** be **prescribed in** each state by the **legislature** thereof."

Art. I, Sec. 4, Con. U. S.

(Michigan Case.)

What is known as the Michigan case, tried and decided the same way in the state and federal Supreme Courts is, in principle, decisive of this case.

McPherson v. Blacker, 92 Mich. 337.
McPherson v. Blacker, 146 U. S. 1, 35.

The provision relating to the election of electors is substantially the same as for electing representatives.

Art. II, Sec. 2.

The history, at some length, of this case is recited and liberal quotations from it will be found in our brief (S. C. O.) 19-25.

The Michigan court held, both in syllabus and opinion, that the legislature had the right to require the states to elect electors in separate districts, and that right was exclusive and could be exercised as often as it pleased. (92 Mich. 378-380.)

The Michigan act, sought to be declared void, provided for representative districts as well as for electors.

Chief Justice Fuller, in the opinion, takes more than usual pains to review the whole subject of the power conferred on state legislatures by the constitution of the United States, including, specially, as to "times, places and manner" of holding elections for representatives as conferred by Sec. 4, Art. I.

Supra, 146 U. S. 25-35.

He says:

> "What is forbidden or required to be done by a state is forbidden or **required** of the legislative power under state constitutions as they exist. The clause under consideration does not read that the **people** or the **citizens** shall appoint," etc. (p. 25).

He also refers to the fact that the constitution of the United States (Sec. 2, Art. 1) provides that representatives shall be "chosen every second year by the **people** of the several states," and that the general practice was for the state legislatures to require them to be elected by districts, adding:

> "It has never been doubted that representatives in congress thus chosen represented the entire people of the state acting in their sovereign capacity." (p. 26).

Also that—

> "It (the constitution) recognizes that the people act through their representatives in the legislature, and leaves it to the **legislature exclusively to define the method** of affecting the object." (p. 27).

The chief justice follows (pp. 27-32) with an historical review of how different state legislatures have exercised their power to appoint electors, likening such power to that they exercise in providing for the choice of **representatives**, and he quotes, with approval, from a report of Senator Morton on the subject to show such power is

> "placed absolutely and wholly with the **legislatures** of the several states." (p. 34).

Adding:

> "This power is conferred upon the legislatures of the states by the constitution of the United States and **cannot be taken from them or modified by their state constitutions** any more than can their power to elect senators."
>
> "Whatever provisions may be made by statute, or by the state constitutions, to choose electors by the people, there is no **doubt of the right of the legislature to resume the power at any time**, for it can neither be taken away or abdicated."

Also adding:

> "From this review * * * it is seen that from the foundation of the government until now the practical construction of the clause has conceded plenary power to the state legislature in the matter of appointing electors." (p. 35).

And further:

> "The question before us is not one of **policy**, but of **power**," etc.
>
> "The prescription of the written law cannot be overthrown because the states have latterly exer-

cised in a particular way a power which they might have exercised in some other way * * *."

"Still less can we recognize the doctrine that because the constitution has been found in the march of time sufficiently comprehensive to be applicable to conditions not within the minds of the framers, and not arising in their time, it may, therefore, be wrenched from the subjects expressly embraced within it." (pp. 35, 36).

Also:

"We repeat that the main question arising is one of **power** and not of policy." (p. 42).

Further quotations from this Michigan case will be found in:

Reply Brief (S. C. O.) 6-7.

And see:

Texas v. White, 7 Wall, 700, 721.

These principles, so emphatically laid down, are each and all applicable and conclusive of a like (or even greater) power granted to legislatures of states (Art. I, Sec. 4) by the constitution of the United States. If any difference were possible, it is in favor of an **exclusive power** being vested in state legislatures in the matter of "prescribing" for the election of "senators and representatives," as said Sec. 4 does not vest any right, as to the manner of their election, in the state as does the section relating to electors.

See both sections, **Supra**, pp. —

Could it be possible that a state might have been deprived of its right to choose United States senators, or that the time, place or manner of choosing them could have been defeated or controlled by a "petition" for a referendum, or by a referendum vote?

And as we have seen, Sec. 1c, constitution of Ohio, prohibits a law of the legislature going into effect for ninety days after its passage. If a state constitution could prevent its legislature from prescribing the manner of electing representatives for three months, it could prevent it altogether.

There certainly can be no right in a state, by its constitution or otherwise, to suspend for any time the right or power given by the constitution of the United States.

Other federal cases might be consulted, not already referred to specifically, which support the exclusive power we maintain exists in state legislatures.

Chisholm v. Georgia, 2 Dall. 419.
Leitensdorfer v. Webb, 20 How. 176.
Ex Parte Seibold, 100 U. S. 271.
In re Green, 134 U. S. 377.

If referendum applies to Ohio to defeat the power of its legislature to regulate the election of Representatives in Congress, it would necessarily apply to defeat its power as to the appointment of electors. Also to the other instances where power is given by the Constitution of the United States (quoted, **Supra,** pp. ——) to state legislatures.

It may be asked: When did the redistricting act of 1915 take effect? The answer is twofold: it took effect on its passage by the legislature, because then the legislature had executed its power under the Constitution of the United States; and it could take effect otherwise under the Constitution of Ohio, on its approval by the governor and "filed with the secretary of state," and, in the absence of a date being fixed therein, under Section 16, Art. II, Con. of Ohio. The act does not fix, or need to fix, a date for its taking effect.

It is held, in a California case (1889) that where a power is imposed on the **legislature** of a state by its constitution, that, although its **laws** are required to have approval of the governor, his approval is not necessary to the exercise of such power.

This language is used:

> "The governor is not, in fact, a part of the legislature. The constitution provides: 'The legislative power of this state shall be vested in a senate and assembly.' It will be seen therefore, that the **legislature** is one thing, and the law-making power of the state another."

Adding, as to the matter submitted, that:

> "It provides for the submission to the **legislature**, which does not include the governor."
>
> **Brooks v. Fischer**, 21 Pac. Rep., 652-3.

The Constitution of California uses substantially the same language found in the Ohio Con., Art. II, Sec. 1. And the term "general assembly" is held, in a criminal case in Ohio, to mean "**legislature.**"

> **State v. Gear**, 7 Ohio, N. P., 551.

> "It (the constitution) recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object." (146 U. S., 27).

And see, infra, quotations, from reports, etc., pp. 42-46.

It follows that if Ohio's Constitution contained an express provision that no act of its legislature should be effective unless approved by a vote of the people it would be in conflict with the Constitution of the United States, and, consequently, **void**. The people of the state can-

not (nor the governor) **veto** an act of the legislature on the subject.

The Congress is a creation of the states of the Union, successor to the Continental Congress (one body) under the Articles of Confederation, which first met in 1774; and to establish a true representative government under the powers and limitations of the Constitution of the United States and by which the organization of the Congress was solely provided for, and, in no sense, was it ever a state matter. And it is settled that where a right may be exercised by both federal and state authority, the former is paramount.

It may be said that the

> "Powers not delegated to the United States nor prohibited to the states, are reserved to the states respectively or to the people." Art. X, Con. U. S.

This, so far as it has any real meaning, is a reservation to all the states and to all the people of the United States collectively, and not to one state or the people thereof.

But this clause of the constitution reserves no political-governmental rights at all, save such as may be worked out through prescribed methods of changing or amending the constitution.

All power is delegated to the United States to provide a Congress, and therefore prohibited to the states, and "to the people."

The first section of the constitution of the United States provides for and vests all legislative powers granted by the Constitution of the United States in a Congress, composed of a senate and house of representatives. Art. I, Sec. 1.

It is also provided that:

> "Representatives shall be apportioned among the several states according to their respective numbers."
>
> Con. U. S., Art. XIV, Sec. 2 (Amendment).

Congress is given the

> "power to enforce by appropriate legislation the provisions of this article." Art. XIV, Sec. 5.

The same rule of apportionment was in the Constitution of the United States on its adoption (1789), Art. I, Sec. 2.

Among the powers of Congress granted is the right to make all laws necessary to

> "carry into execution * all * powers vested by the Constitution of the United States in the government of the United States, or in any department thereof."
>
> Art. I, Sec. 8 (par. 18).

The right reserved to Congress (Sec. 4, Art. I), in the Constitution of the United States to, "at any time by law make or alter * * * regulations" of state legislatures as to the "times, places and manner of holding elections for senators and representatives," has been frequently exercised by Congress, at least in part.

The last apportionment act fixed the number of districts in each state. U. S. Stat., 1 Sess., 62 Cong. (1911), p. 13. And this act and other general laws, also fix the time (Tuesday after the first Monday in each even year) for electing representatives.

> R. S. U. S. (1878), Sec. 24.
> See Ex Parte Yarborough, 110 U. S. (660-2).

But we have seen (**Supra**, p. —) that it was left by the last (1911) apportioning act of Congress to the state

legislatures to redistrict the states for the purpose of electing representatives, and this has accordingly been done.

It should be observed that there was no referendum in Ohio at the last (1911) apportionment, and none anywhere when the Constitution of the United States went into effect (1789).

The people of the state have no more power to interfere with this legislative redistricting than to make "regulations" or a law changing the apportionment among the states or the time of holding the election of representatives.

Congress can only look to the legislative redistricting to see whether or not it is called upon to, in the exercise of its reserved power, change or alter it.

In the matter of districting a state for congressional purposes, the people of the republic can only speak through state legislatures.

If, as must be conceded, the people of Ohio cannot create congressional districts or change or alter existing ones by vote. It is impossible for them to reject an act of the state legislature redistricting the state, or prevent it going into effect for ninety days or for a much longer time by petition of a small fraction of its electors as the plan of referendum provides:

"The functions of a legislature must be exercised by it **alone** and cannot be delegated."

6 Am. & Eng. Ency., p. 1021, n. 6.
Cincinnati v. Clinton Co., 1 O. S., 77.

"The power of the general assembly to pass laws cannot be delegated by them to any other body or to the people."

(Supra), 1 O. S., 77, 87.

It follows that the power exclusively given to the legislature by the supreme organic law of the United States cannot be either delegated or assumed in any manner by the people of the state of Ohio.

> "Provisions of a state constitution that are in conflict with those of the federal organic law will be declared inoperative."
>
> 6 Am. & Eng. Ency., pp. 1079-1080, n. 1.
> Cooley on Limitations.
> **Dodge v. Woosley**, 18 How., 331.
> **Gunn v. Barry**, 15 Wall., 610.
> **Gas Co. v. Light Co.**, 115 U. S., 672.
> And see below—Congressional Precedents, pp. 33-38.

Each government is sovereign within its own powers.

> 4 Ency., U. S. Rep., 185, n. 19.
> **Republic v. Cobbett**, 3 Dall., 467, 473.
> **McCullough v. Maryland**, 4 Wheat., 376.

In the instances where (as under Sec. 4, Art. I, Con. U. S.) the right is given to exercise a certain power by law, and the right is reserved to Congress "to make or alter such legislation," the latter's failure to act leaves the legislature with such full power.

> 4 Ency. U. S. Rep., p. 175, n. 90.
> **Sturges v. Crowingshield**, 4 Wheat., 122.

> "Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the state retires and lies in abeyance until a proper occasion for its exercise shall recur."
>
> 4 Ency. U. S. Rep., 175-6, n. 91.
> **Gilman v. Philadelphia**, 3 Wall., 713.

CONGRESSIONAL PRECEDENTS.

The principle involved of the right by referendum to control or defeat the power given to state legislatures has been long settled by the action both of the senate and house of representatives of Congress.

(Missouri Cases.)

Long since (1844) the house of representatives of Congress, through a report of Stephen A. Douglas for a committee, decided that Congress had no power to **require** a state legislature to create separate districts for its members, but that the legislature could provide for their election at large, uncontrolled by any authority, unless Congress chose to provide otherwise instead of the legislature, as authorized by Section 4, Art. I of the Constitution of the United States.

The report and decision of the house was that Congress possessed no power to compel a state legislature to prescribe any particular plan for fixing the "times, places and manner of holding elections for senators and representatives."

This report concluded by saying, the constitution—"the great charter,"

> "intended that the regulation of the times, places and manner of holding the elections should be left **exclusively** to the legislatures of the several states."

subject, only, to independent congressional action.

Douglas and others in debate insisted that "**Congress** had no power to **district** the states, for that would be to prescribe the qualification of voters as to residence."

1 Hinds' Prec. of H. of R., pp. 170-2, Sec. 309-310.
I Bart. Con. Elec. Cases, pp. 47, 60.

(In cases last cited are found important history relating to embodying the provisions in question here).

And see like history summarized by Senator Douglas, and others, 1 Bart, &c., pp. 51-7.
Brief (S. C. O.), pp. 41-46.

(Iowa Cases.)

The Holmes and other cases arising from Iowa (1880) are to the same effect in denying that a state constitution cannot control its legislature in the matter of districting, etc.

1 Hinds' Prec., pp. 667, 672, Sec. 525.

(Virginia Cases.)

One Segar presented (1861) credentials showing his election to the house from the First District of Virginia. It turned out that he was elected in a district created by the people in convention and not by a legislature of the state, though there was one in existence that had not districted the state. It was held that a legislature being in existence it, only, could district the state.

1 Hinds' Prec., pp. 391-2, Sec. 363.

The Beach-Virginia case resulted in a similar decision in the house.

1 Hinds' Prec., pp. 300-2, Sec. 367.

In the Davidson-Gilbert contest (1901) arising from Kentucky, it was claimed that the legislative redistricting

> "act was contrary to the state constitution, and that it had never properly passed the legislature."

The house committee dismissed this contention "without discussion, as having no foundation."

It also upheld the legislature's exclusive right to, as often as it pleased, redistrict or change or alter districts.

1 Hinds' Prec., pp. 180-1, Sec. 313 and p. 672, Sec. 525.

See, also, as sustaining the view that a state constitution cannot control its legislature: West Virginia (1873) and Colorado (1877) cases.

1 Hinds' Prec., pp. 659, 653-4, 661-672, Sec. 522, 524.

Some distinguished statesmen have, with great force, maintained that when a state legislature prescribes for the election of senators and representatives, and also electors, as the Constitution of the United States authorizes, its acts are the federal laws, not state.

1 Hinds' Prec., p. 172, Sec. 310, 525, u. 24, Sec. 856.

The sole power of the state legislature is derived from the Constitution of the United States. The rights involved are not of individuals who may be elected or defeated or of the people of districts or of a whole state but of the **whole United States.**

(Michigan Case.)

The case of **Baldwin v. Trowbridge** (1866) arose in Michigan and involved the right of its legislature to fix the times, etc., for electing representatives in Congress, resulted in sustaining such right, both by committee report and the judgment of the house. The report is able, elaborate and conclusive.

II Hinds' Prec., pp. 24-6, Sec. 856.

The Baldwin v. Trowbridge case **(Supra)** is also cited in the same book, p. 240.

Also in Contested Election Cases in Congress (1865-1871), p. 43.

And this language is used:

> "The **legislature** of a state does not acquire its right or power to make a law regulating the manner of holding elections for representatives in Congress from the constitution of the state, but this right and power is derived **exclusively** from the Constitution of the United States."
>
> II Hinds' Prec., p. 240, Sec. 947.

(Minnesota Case.)

The memorable Donnelly-Washburn case (1880) from Minnesota, involved the right of a state legislature to regulate the time, place and manner of holding an election of a representative, and in the reports thereon the view was upheld that it derived its power "from the federal and not the state constitution."

II Hinds' Prec., pp. 230, 238, 240-1, Sec. 945, 6-7.

The report cited, ex parte Seibold (100 U. S., 371), where this right was considered, quoting from the syllabus this:

> "Where there is a conflict of authority between the constitution and laws of a state in regard to fixing the place of elections the power of the legislature is paramount."

(Tennessee Case.)

The **Davis v. Sims** case (Tenn. 1904), also involved the question of the exclusive power of a state legislature to prescribe the time, place and manner of electing representatives to Congress, and authorities are cited in the report, etc., to support the view that the legislature possessed such power.

II Hinds' Prec., p. 738, Sec. 1132, and p. 742, Sec. 1133.

Baldwin v. Trowbridge, 2 Bart.

Donnelly v. Washburn, 1 Ells., 495.

McCreary's Law of Elections, 109-112.

(Senatorial Cases.)

The decisions on swearing in persons claiming elections as senators as prescribed by state legislatures, are even more emphatic and the members of the senate are more nearly unanimous in holding that state legislatures have exclusive power in the premises than the house.

When (1877) John T. Morgan (Alabama) and L. Q. C. Lamar's (Mississippi) credentials were presented and they appeared to be sworn in as senators, objection was made that in the election the will of the people had been subverted by violence &c., but it was not denied that they had been chosen as prescribed by the **legislature** of Mississippi.

Morton of Indiana and Dawes of Massachusetts, and other distinguished senators were then in the senate. Only one vote was cast against the resolution to swear each in.

I Hinds' Prec., pp. 286-7, Secs. 359, 360.

In the senate election case of **Lucas v. Faulkner** (W. Va., 1887) it was held:

> "In electing a senator the state legislature acts under authority of the Federal Constitution and laws conflicting therewith are **void**."

I Hinds' Prec., p. 841, Sec. 632.

The same section of the Constitution of the United States provides the like rule of electing representatives.

Senator George F. Hoar of Massachusetts objected to Mr. Faulkner being sworn, and his credentials and all papers relating to the case were referred to the senate committee on elections.

On December 4, 1887, Senator Hoar, as chairman, made a **unanimous** report from the committee in favor of seating Mr. Faukner, which was adopted without division.

This language was used in the report:

> "The Constitution of the United States is the supreme authority, and all provisions or statutes of any state are **void** and of no effect unless they

can be construed as not to be in conflict with its provisions."

I Hinds' Prec., pp. 841-3, Sec. 632.

How applicable is this to the Ohio referendum provision?

See also Harlan (Iowa) senatorial case in which it was held that a state legislature in electing a United States senator must act in its separate houses, and not in joint session.

I Hinds' Prec., pp. 1099-1100, Sec. 844.

During the civil war the question of authorizing soldiers outside their States was much considered, and in some States it was held laws permitting it were unconstitutional, but it seems always to have been held that State legislatures by virtue of Sec. 4, Art. II, Con. of U. S., could authorize soldiers to vote anywhere for Representatives in Congress.

Voting in the Field (Benton) 9-10, 85, 100, 103.
And—Opinion of Judges—37 Vermont, 665.

We refrain from considering here other like cases and decisions.

CONVENTIONS.

There has been some confusion rather than conflict of views growing out of admitting new states and electing representatives at the same time as provided in a prior convention plan. Such provisions have sometimes been held to "anticipate the action of a yet to be chosen legislature," but it has always been held that where there was a state legislature its power was exclusive.

I Hinds' Prec., p. 649, Sec. ——, and pp. 653, 655.
I Bart. Con. Elec. Cases, p. 392.
Jameson on Con. Conventions, p. 409.
And see: Brief, (3 S. C. O.), p. 49.

26 SOUTH DAKOTA CASE.

This Dakota case is solely relied on by court or counsel as sustaining the view that Section 4, Art. I of the Constitution of the United States

> "conferred the power therein defined upon the various state legislatures * * as may assume to exercise legislative power, whether that power is lodged in a single or two-chamber body, or whether the functions of the latter be curbed by a popular vote or its enactments approved by a referendum."

The opinion states: "This view is sustained in State ex rel. Schroder v. Polley, 26 S. Dak., 5."

Record, p. 24.

There is not a word in it, syllabus or opinion, that case favoring such view, on the contrary, seeming to avoid any idea that said Section 4 conferred upon state legislatures any such fallacious power, the court in that case held:

> "In the first place, we are of the opinion that **no power** to divide the state into congressional districts was ever delegated to the legislature of the state by Section 4, Art. I, of the Federal Constitution."
>
> 26 S. D. (8).

The opinion further states:

> "Power was not delegated to the state legislature or to the state itself to regulate such elections, because the state already, in its sovereign capacity, possessed that power, and the Federal Constitution simply left that power with the state where it reposed."
>
> (P. 9.)

The court did not care to undertake to recognize any authority conferred on the legislature of South Dakota by the Constitution of the United States, and then try to show that petition and referendum was a part of it, or took away its authority.

That case assumes to be bottomed on the congressional case of Baldwin v. Trowbridge (2 Bart., 46), the only syllabus of which reads:

> "Where there is a conflict of authority between the constitution and legislature of a state in regard to fixing the place of elections, the power of the **legislature is paramount.**"

The converse proposition was voted down, 30 for, 108 against.

> Baldwin v. Trowbridge, 2 Bart., 46.
> 2 Hinds' Prec., pp. 27, 240.

Referendum, however, in South Dakota is distinctly different from in Ohio. The people there participate with the legislature in making the laws. They then **compel** the legislature to enact laws they propose and to submit them to a vote of the people. The language of the constitution runs:

> "The people expressly reserve to themselves the right to propose measures, which measures the legislature **shall** enact and submit to a vote * * before going into effect."
>
> Sec. 1, Art. III, Con. S. Dakota.

We have said enough about this case in

> Brief, (S. C. O.), 47-48.
> Reply Brief, (S. C. O.), 8-9.

REFERENDUM—OHIO—NOT REPUBLICAN IN FORM—UNCONSTITUTIONAL.

If referendum, by a vote of a plurality of the voting people, is not "**Republican in form**" it cannot be used to reject, as the Constitution of Ohio provides, the right of the **legislature** of the state to prescribe the "times, places and manner" of electing representatives in Congress, a right given solely by Section 4, Article I, Constitution of the United States.

That such referendum as is provided for by Article II, Constitution of Ohio is **not** republican in form seems clearly and repeatedly held by this court for the reason that it seeks to provide a separate popular form of government wholly independent of the representative constitutional government established for the United States, and inconsistent with it.

> It must be kept in mind that, neither petition or referendum vote had anything to do with the enacting of the redistricting act of 1915.

We refrain from making liberal quotations to define what is not republican in form, and consequently unconstitutional.

Chief Justice Fuller in summarizing settled authority uses this language:

> "By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their governments, national and state, have been limited

by written constituitons, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities."

In re Duncan, 139 U. S., 461.

The chief justice refers to Luther v. Borden, 7 How. (48 U. S), 1, and quotes and approves Webster's argument in that case wherein he recognizes "that the people are the source of all political power" in our American system of government, adding:

"but that as the exercise of governmental powers immediately by the people themselves is impracticable, they must be exercised by representatives of the people; that the basis of representation is suffrage; that the right of suffrage must be protected and its exercise prescribed by previous law, and the results ascertained by some certain rule; that through its regulated exercise each man's power tells in the constitution of the government and in the enactment of laws; that the people limit themselves in regard to the qualifications of electors and the qualifications of the elected, and to certain forms for the conduct of elections; that our liberty is the liberty secured by the regular action of popular power, taking place and ascertained in accordance with legal and authentic modes;"

Supra, 139 U. S., 461-2.
See also: 6 Webster's Works, p. 217.
4 Ency. U. S. Rep., pp. 319, 330, and notes.

Chief Justice Taney speaking for the whole court says:

"The guaranty is of a republican form of government. No particular government is designated as republican, neither is the exact form to be guaranteed, in any manner especially designated. Here, as in other parts of the instrument, we are compelled to resort elsewhere to ascertain what was intended.

The guaranty necessarily implies a duty on the part of the states themselves to provide such a government. All of the states had governments when

the constitution was adopted. In all the people participated to some extent, through their representatives elected in the manner specially provided. These governments the constitution did not change. They were accepted precisely as they were, and it is, therefore, to be presumed that they were such as it was the duty of the states to provide. Thus we have unmistakable evidence of what was republican in form, within the meaning of that term as employed in the constitution."

Minor v. Happersett, 88 U. S. (21 Wall.), 175-6.

We are not here concerned with questions as to how territories might be organized by acts of Congress, but of states.

Justice Brown in an opinion announcing the conclusions of this court says:

"Notwithstanding the duty to 'guarantee to every state in the Union a republican form of government,' Art. IV, Sec. 4, by which we understand, according to the definition of Webster, a government in which the supreme power resides in the whole body of the people, and is **exercised by representatives** elected by them," etc.

Downes v. Bidwell, 182 U. S. (279).

Ohio on its admission into the Union, (1803, under its constitution of 1802, had a legislature composed of a senate and house of representatives and a like legislature under its later (1851) constitution, and it still has, as amended (1912) a like constituted legislature, the language used running thus:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives."

Art. II, Sec. 1, Con. of Ohio.

"Every bill passed by the general assembly shall, before it becomes a law, be presented to the gov-

ernor for his approval. If he approves, he shall sign it and thereupon it shall **become a law** and be filed with the secretary of state.

"All laws of a general nature shall have uniform operation * * nor shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as provided in this constitution."

Art. II, Secs. 16, 26, Con. of Ohio.

"No power of suspending laws shall ever be exercised except by the general assembly."

Con. of Ohio, Art. I, Sec. 18.

The provisions just quoted are each now in the Constitution of Ohio and have been since 1851, including the excepting clause to the last quotation. The so-called referendum provisions found in Article II are, as we have seen, not legislative in character as part of the **legislature** of Ohio, but negative, to reject an act after its passage and would otherwise become a law under the Constitution of Ohio.

Ohio having, on becoming a state in the Union, a republican form of government as required by the constitution and form of the federal government, the people thereof were without power by constitutional amendment or otherwise to change or abolish it.

Von Holst, Const. Law of U. S., 236, 237.
Koehler v. Hill, 60 Iowa, 543.
Appeal of Allyn, 81 Conn., 534.
Cooley Const. Lim. (7 Ed.), p. 62.

The guaranty of a republican form of government is for the people of the states and to each individual citizen and for their protection, as well as to the states as political bodies, and to also secure to each their proper

departments, executive, legislative and judicial, necessary to the exercise of their constitutional powers and duties.

(Even Patrick Henry, much given to advocate a pure democracy against constitutionally delegated powers, conceded that the constitution established a representative government, republican in form.)

See 3 Elliott's Debates, p. 55.
Black's Const. Law (2 Ed.), 262.
Rice v. Foster, 4 Harr. (Del.), 479.
Minor v. Happersett, 21 Wall., 162.
Martin v. Martin, 20 N. J., 421.

To permit a state to change its constitutional form of government to that which is not would be violative of the provision:

"No state shall **make or enforce** any law which shall abridge the privileges and immunities of citizens of the United States."

Art. XIV, Con. of U. S.

The people of a state possess no more independent sovereign right to limit, curtail, reject or take away the powers and duties of a constitutionally organized legislature than they possess to do the same to the executive and judicial departments of the state. If such power can reject a law of the legislature by vote after it has otherwise become a law under the constitution of the state, why may not the same power, exercised by a plurality vote of the people be used to take away all executive and constitutional power vested in the executive of the state, and to alter, change and reverse or wholly take away or annual all judicial power thus vested in the courts?

Even this power has been proposed as an existing sovereignty of the people.

If such power is, as contended (Record, p. 25) "reserved to the states or to the people thereof" (Art. X, Con. U. S.) it certainly includes the people of all the states of the United States, and would give them the sovereign right to, by a rejecting vote, annul all executive, legislative and judicial powers. This would be anarchy and revolution; and our constitutionally created representative government would be overthrown.

But the people of the states and United States reserved no right to limit or destroy the executive, legislative and judicial powers expressly confered by the Constitution of the United States and by the republican form of government thereby established.

We have shown that the legislatures of the states are vested, by Sec. 4, Art. I, Con. of the U. S., with the right to prescribe the "times, places and manner" of electing representatives to Congress, and that they derive no such power from state constitutions.

However, if powers granted alone by state constitutions might be taken away through a change in them from a republican form of government, it seems certain that such change cannot take from a state legislature a power solely derived from the Constitution of the United States.

Brief, (S. C. O.), pp. 6-7, 9-11.
Reply Brief, (S. C. O.), pp. 9-13, 47.

But a majority of the people of a state, by amending its organic law cannot take away rights granted by national authority.

U. S. v. Cruikshank, 92 U. S. (549).

We quote from an opinion of Chief Justice Waite.

"In the formation of a government the people may confer upon it such powers as they choose."

* * * * * *

"Experience made the fact known to the people of the United States that they required a national government for national purposes. The separate governments of the separate states, bound together by the articles of confederation alone, were not sufficient for the promotion of the general welfare of the people in respect to foreign nations, or for their complete protection as citizens of the confederated states. For this reason, the people of the United States, 'in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty'' to themselves and their posterity (Const. Preamble), ordained and established the government of the United States, and defined its powers by a constitution, which they adopted as its fundamental law, and made its rule of action.

The government thus established and defined is to some extent a government of the states in their political capacity. It is also, for certain purposes, a government of the people."

U. S. v. Cruikshank, 92 U. S., 549.

Above and over all, a national government for the states and the people, was framed, with three dominant governing powers, the legislative being necessarily representative, republican in form, as distinguished from a pure democracy where the people are claimed to rule without representative or monarchical power, which was long ago found to be the weakest form of government, if a government at all, that could be attempted.

Even wild Indian and barbaric tribes have their governing chiefs who alone meet in council on great occasions.

The Eskimos are said to have no chiefs or rulers; those only govern while successful in providing for the wants of the tribe they belong to, all property being held in common—socialism.

The Constitution of the United States, (Art. VI) is the Supreme law of the land, and the representative government created by it must obtain.

We take here the liberty of referring to authorities cited in argument in a recent case in this court, Pac. Tel. Co. v. Oregon, 223 U. S., 118.

The citations are to the effect that a democracy is unrepublican; that all citizens are entitled to be protected by a republican form of government; that initiative or referendum is not republican in form. There is a broad difference between a republic and a democracy.

(Supra) 223 U. S. (123.)

A government is not representative and republican in form in which the people at large act as legislators. There are many decisions of courts and congressional reports sustaining this view.

See—Brief (S. C. O.), pp. 39-42.

The debates of the constitutional convention and the federalist papers are important and conclusive as to what is meant by "republican in form." So, Hamilton's Works, &c.

(Supra) 223 U. S., 124.

And see specially:

McCullough v. Maryland, 4 Wheat., 419.
Cohens v. Virginia, 6 Wheat., 418.
Pallock v. Farmer's Tr. Co., 158 U. S., 601.
McPherson v. Blacker, 146 U. S., 1.
R. I. v. Mass., 12 Pet., 657.
Federalist—No. 48, No. 14, No. 10.
12 Hamilton's Works, 28.
2 Elliott's Debates, 253, &c.
Views of John Marshall.
3 Elliott's Debates, 225, 233.
11 Hamilton's Works, 75.

Republican form of government existed in all the states when the constitution was adopted.

5 Elliott's Debates, 239.

Representation is the vital element in a republican form of government.

Supra, 223 U. S., 125.
In re Duncan, 139 U. S., 461.
State v. Swisher, 17 Texas, 448.
Rice v. Foster, 4 Harr. (Del.), 479.
Clarke v. Rochester, 28 N. Y., 606, 633.
Story's Const., 388.
Yearman's Study of Government.
Jefferson's Writings, 452.
Bartlett's Dig. Elec. Cases, 446.

In the Oregon case there arose a question as to the construction of Section 4, Art. IV of the Constitution of the United States, which guarantees "every state a republican form of government," and whether referendum could or did take it away. The case went on writ of error to the Supreme Court of the United States, but it was dismissed, that court holding that the matter of such guarantee was exclusively committed to Congress. The court did not, therefore, pass on the effect of the Oregon referendum. The case, however, has much learning in its presentation. It is therein pointed out that legislation by representatives elected by the people is the distinguishing feature of a republican form of government.

Pac. Telephone Co. v. Oregon, 223 U. S., 118, 124-6.

That the character of our republic is that of a representative government, and not a pure democracy governed by the people, is there discussed, and distinguished, and authorities, historical and judicial, are

largely cited in support of that view. (223 U. S., 120-6). Authorities are cited (p. 121) holding the sovereign power of the states is subordinate to that of the federal government over its citizens.

Crandall v. Nevada, 6 Wall., 35.
Lane Co. v. Oregon, 7 Wall., 76.
Koehler v. Hill, 60 Iowa, 543.
Story on the Con., Sec. 318.
Elliott's Debates, Vol. V, 239.

"Laws must emanate from the law-making power, and in a constitutional republic, that power can only be a representative legislature created in accordance with the organic law."

Supra, 223 U. S., 122.

It is further logically contended that under our form of government, the Constitution of the United States could not (as well as did not) confer legislative power on the people of a state, but could only confer it on its legislature.

The distinction between an oligarchy or a democracy, that is, between a representative republic and a democracy wherein the people made the laws for all, is well defined on the highest authorities. (223 U. S., 123.)

We cite only a few of them here.

Downs v. Bidwell, 182 U. S., 279.
Cooley's Com. Lim., 194.
Minor v. Happersett, 21 Wall, 162.
In re Duncan, 139 U. S., 461.
15 Jefferson's Writings, 452.

It is also maintained that a government cannot be said to be representative in which the people at large make the laws, and that the framers of the constitution recognized the distinction between a representative republic and a democratic form of government. (223 U. S., 124).

For views of John Marshall, later chief justice, see:

3 Elliott's Debates, 225, 233.
Federalist No. XIV.
Hamilton's Works, XI, 101, 103.
5 Elliott's Debates, 136.

And the form of the state governments recognized and perpetuated by the constitution was "with the three departments in force in all the states at the time of the adoption of the constitution.

223 U. S., 124.
5 Elliott's Debates, 239.

It has been repeatedly said that legislation by the people is "subversive of the structure of our republic." (223 U. S., 125, and cases cited.)

> "That the Federal Constitution presupposes in each state the maintenance of a republican form of government, and the existence of state legislatures, to wit: representative assemblies having the powers to make laws; and that in each state the powers of government will be divided into three departments, a legislative, an executive and a judiciary."
>
> * * * * * *
>
> "State legislatures are a vital feature of our government; the Federal Constitution presupposes their existence."
>
> * * * * * *
>
> "Under the constitution the state legislatures are the agency to carry on the relations between the nation and the states."
>
> "The word **'legislature'** in the constitution means a representative assembly consisting of **two houses**, empowered to make the law.
>
> "Such was the meaning at the time of the adoption of the constitution."
>
> 223 U. S., 125.

IF NOT REPUBLICAN IN FORM, JUSTICIABLE IN THIS ACTION.

Assuming, as settled, that referendum as provided for by the Constitution of Ohio, is not "**republican in form**" and therefore unconstitutional, the question arises as to whether the courts have jurisdiction to hold that it cannot be used to reject the 1915 act of the Ohio **legislature** prescribing the "times, places," &c., of electing representatives in Congress.

Admitting (as we do) that it is rightfully settled by the highest authority (223 U. S., 118, and 7 How., 1, &c.) that this court has no jurisdiction to guarantee, by judicial decree, to the states a republican form of government; that the right to so guarantee is political and vested under Art. IV, Sec. 4, Constitution of the United States, we still confidently submit that whenever an action, as in this case, involves a denial of individual rights, courts possess the right and the duty to exclude the operation of the unconstitutional provision and to regard the question arising as judiciary.

In a comparatively recent case it was held that as the action was instituted to enforce the guarantee on the state of Oregon, that this court did not possess jurisdiction for that purpose, but, as we understand, from the chief justice's opinion, this holding applies to the purely political question involved in deciding whether a state government is republican in form,

> "but that the right existed in the courts to exercise the judicial power and ever present duty whenever it becomes necessary in a controversy when properly submitted to enforce the constitution as to each and every exercise of governmental power."
>
> Pac. Tel. Co. v. Oregon, 223 U. S. (118), 150.

That case was an action to require the court to enforce against the state of Oregon Section 4, Article 4, Constitution of the United States; all other grounds of the action being withdrawn, leaving only a purely political question (p. 136). In the closing part of the opinion it is said, among other things, that the license tax complained of was not involved. In the opinion it is made plain that if the claim had been asserted that the company should not be required to pay the tax because its constitutional rights were violated the court would have had jurisdiction to grant relief. This language is used:

> "If such questions had been made they would have been justiciable, and therefore would have required the calling into operation of judicial powers. Instead, however, of doing any of these things, the attack on the statute here made is of a wholly different character. Its essentially political nature is at once made manifest by understanding that the assault which the contention here made, is not on the tax as a tax, but the state as a state."
>
> "It is the government * * which is called to the bar of the court, not for the purpose of testing judicially some exercise of power assailed, on the ground that its exertion has injuriously affected the rights of an individual because of repugnancy to some constitutional limitation, but to demand of the state that it establish its right to exist as a state, republican in form."
>
> (Pp. 150-1.)

We are only asking in this action that a federal constitutional right shall not be taken away by a provision in a state constitution not in conformity with our form of government and forbidden by its constitution.

While it is true that Congress has the exclusive political and legislative duty and power imposed on it to "guarantee to every state in the Union a republican form of government," there is no power withheld from

the courts to adjudge, that which, in a state constitution or law, may be violative of the Constitution of the United States, to be invalid and inoperative to affect private or personal rights until Congress takes proper action.

And we are not dealing, as do cases hereafter mentioned, with general political rights guaranteed to citizens by provisions of the Constitution of the United States supposed to have been taken away by state constitutions or laws. Our claim is that a state constitutional provisions, not "republican in form," is used to take from a **legislature** of a state a power solely conferred on it by the Federal Constitution, and a power required to be exercised in electing representatives in the Congress of the United States.

In an early case (in trespass) the principal question arose as to which of two bodies constituted the legislature of Rhode Island, this court held the courts of the state had a right to declare which was the rightful one, and the questions arising concerned "merely the constitution and laws of the state," and still this court entertained jurisdiction.

Luther v. Borden, (7 How.), 48 U. S., 1.

The case clearly distinguished cases between citizens and a state involving questions of the rightful making or the wisdom of its constitution and laws and cases where individual personal rights, political and otherwise, were involved.

Supra, 48 U. S., 54, 59.

This court has very often taken jurisdiction in cases involving rights of private parties as affected by pro-

visions of the Constitution of the United States, though political, like the franchise to vote, &c. See citations:

223 U. S., 127-8.
Forsyth v. Hammond, 166 U. S., 519.
Yick Wo. v. Hopkins, 118 U. S., 369.
Boyd v. Thayer, 143 U. S., 135.
Coyle v. Smith, 221 U. S., 559.

And so in an action between a state and the United States involving Sec. 4, Art. IV, relating to states being required to be republican in form.

South Carolina v. U. S., 199 U. S. (437), 454.
Taylor v. Beckham, 178 U. S. (548), 578-9.
Texas v. White (7 Wall.), 74 U. S., 700, syl. 10.
In re Duncan, 139 U. S., 449, 461.

A Kentucky case has been claimed to hold that this case was political and therefore not justiciable.

Richardson v. McChesney, 128 Ky., 363.

The action was in mandamus to compel the legislature to provide certain geographical congressional districts. The court held it had no jurisdiction to control it; that:

> "The Constitution of the United States contains no direction to the states on the matter of apportionment of the state into congressional districts." (P. 363, syl. 2.)

And see same case—218 U. S., 487.

We repeat, it is impossible to conceive that a provision in a state constitution repugnant to our form of government and the Constitution of the United States can be used to overthrow a power granted by the latter constitution to a state legislature to do that which is essential to the organization or, possibly, the very existence of the Congress of the United States.

REVIEW OF OPINION OF SUPREME COURT OF OHIO.

The last syllabus of the case is not questioned. The others are inconsistent in themselves, and with each other, and not consistent with the facts and the constitutional provisions referred to, and are not supported by any authority whatever.

I.

Legislature—What Constitutes.

The first syllabus declares the

> "term 'legislature' in Section 4, Article I, of the United States Constitution * * includes not only the two branches of the general assembly, but the popular will as expressed in the referendum provided for in Sections 1 and 1c of Article II of the Ohio Constitution."
>
> Record, p. 20.

This is another form of stating that the word "**legislature,**" as used in said Section 4, Article I, includes that which has nothing to do with it enacting laws, or their going into effect, or even of approving laws passed by legislatures, and something more than Ohio's constitution expressly provides shall constitute its sole legislative authority.

> Art. II, Sec. 1.

This holds that the word "legislature" meant another agency, in no sense a part of it, but possessed of an independent power to **reject** law of the legislature after it has been duly passed—that an agency that has

nothing to do with enacting a law is a constituent part of the body that enacted it. This holds that the sense in which the word **legislature** was used and understood by the framers of the Constitution of the United States, is not the sense in which the word is to be regarded now. This applies the theory that the "popular will" acting independently of the **legislature** to veto laws which go into force under both the State and Federal constitutions is a part of the legislature of the State of Ohio.

There are, in no proper sense, branches to a legislature; it is an entity, composed, in Ohio, of a Senate and House of Representatives, requiring only the concurrent act of each to pass a law. (Art. II, Sec. 1.)

It seems worse than absurd to say the "popular will", by a referendum vote, after being petitioned for by a small fraction of the electors, may be invoked to reject a law that has been regularly passed as much as seventeen months before such vote, and that it becomes a part of the legislature that passed the law that it rejected or thus vetoed. The sole power to reject, under certain circumstances and conditions, a legislative act, cannot constitute the rejecting agency a part of the body which enacted the law.

It must be kept steadily in mind that the popular will or so-called referendum has no part, directly or indirectly, in passing any law by the general assembly of Ohio; nor is a vote of the people required in any case for an act passed by it to go into effect.

Art. II, Secs. 1, 1c.

The Act of May 27, 1915, was passed without even being petitioned for, and it went into effect at once by virtue of Sec. 4, Art. I, Con. of the U. S.; also as expressly provided in Section 16, Art. II, Con. of Ohio. The

1913 Act passed and became a law as did the 1915 Act, without the people having anything to do towards its passage, or its going into effect. (It is now claimed to be in full force.) If power was attempted to be given the "popular will," or the people, to **approve or veto** a bill passed by the **legislature** of Ohio as is given the Governor (Sec. 16, Art. II) there might be some shadowy ground for claiming the "popular will" as a part of the legislature. It is, however, held that a Governor, having the power to veto bills, is no part of the legislature that pass them.

Brooks v. Fischer, 21 Pec. Rep. 462-3.
See Brief, (Ohio S. C.) 28.
State ex rel. v. Marlow, 15 O. S. 114, 133-5.
State ex rel. v. O'Brien, 47 O. S. 470, 473.
State ex rel. v. Ganson, 58 O. S. (323).
And see Brief (S. C. O.) Pp. 27-28

As well might it be said that a **court** having the right to declare a law unconstitutional was a part of the legislature that passed it.

If it could be claimed that there are two legislative authorities in Ohio, one the usual legislature composed of a Senate and House, and another by referendum vote, neither authority participating in the proceedings of the other, still there can be no doubt but what there is but one "**legislature**" empowered to act under Sec. 4, Art. I, Con. of the U. S.

"Popular will" or referendum was unknown at the time of the framing (1787) and adoption of the Constitution of the United States. Referendum legislation was not then, or ever, a mode of legislation even in a democracy. Popular assemblies of the male population sometimes passed laws, for town and local purposes—never for States.

There, necessarily, can be but one legislature of a State, and especially as empowered by Sec. 4, Art. I, Con. of the U. S., to prescribe the "times, places and manner" of electing Representatives. (223 U. S. 120).

"Legislatures are the creatures of the Constitution. They owe their existence to the Constitution."

Luther v. Borden, 48 U. S. (7 How.) 66
Vanhorne's lessee v. Dorrance, 2 Dall. 398.
Vattel, ch. 3, Sec. 34.

If it be said that petition to the general assembly may initiate the right of the people to separately pass a law by referendum vote, it still remains a fact that if not passed or no action is taken thereon within four months, such vote alone might pass the desired law, without the general assembly's participation in any way, and it would become a law without the legislature having any part in it or its being submitted to the Governor.

Con. of Ohio, Art. II, Sec. 1b.

There is no special provision for its ever being repealed or superseded; certainly none by the General Assembly.

'The style of all laws submitted by initiative and supplemental petition shall be:
'Be it enacted by the **People** of the State of Ohio.' "

Con. of Ohio, Art. II, Sec. 1g.

And it is provided that:

"The style of the laws of this State shall be: 'Be it enacted by the General Assembly of the State of Ohio.' "

Con. of Ohio, Art. II, Sec. 18.

This styling of laws seems to determine, if there was otherwise doubt, that the general assembly of Ohio constitutes, alone, its legislature.

And, see Brief, (O. S. C.) p. 7.

Petition is not new in Ohio or in the United States. It is not referendum or legislation. The right of petition is incident to a representative, a republican form of government. The constitutions of Ohio and United States each, throughout their existence, has granted the right to petition its legislative body "for the redress of grievances."

Con. of Ohio, Art. I, Sec. 3.
Con. of United States, Art. I, (amdt.)

(Definition of Legislature.)

In the opinion (R. 24) **Dictionaries** are quoted defining "legislature," a body

"Invested with power to make, alter and repeal laws"—"to make laws or rules for the **community** represented by them."

These definitions are not questioned. Under the first one, the "body" must be invested with the right to do three things—"**make, alter and repeal laws**" to constitute a legislature at all. Under the other, "to make laws or rules" for those they represent—those who elected them.

How does Ohio referendum become a part of such **body** under either definition? A vote of the people had nothing to do with making the law in question, or any law. They do not participate in making, altering or repealing any law, and they never, by vote, act in a representative capacity. If the Constitution of Ohio gives the people authority to "make, alter or repeal laws," it is independent of the legislature—not a part of it.

Con. of Ohio, Art II, Secs. 1b, 1e, 1g.

REFERENDUM—NOT FOR APPROVAL OF LAWS.

The second syllabus, though a misstatement of what is requisite under Ohio referendum, is only another way of saying that a referendum vote, as provided in the Ohio constitution, may be used to reject a law of the State legislature duly passed, prescribing "the times, places and manner" of electing representatives in congress.

It, however, rightfully recognized two independent powers, each enacting laws separately, not together. It is patently erroneous to say that

> "If a congressional redistricting act, passed by the general assembly and lawfully submitted to a referendum for popular vote * * fails of approval by a majority of those voting on the same, such act is invalid and inoperative."
>
> Record, p. 20.

Instead of regarding the legislature, as does syllabus ‡I, as including referendum, syllabus ‡2 regards the Act as passed by the legislature alone and thereafter repealed by referendum. Referendum is not, as just shown, necessary to a redistricting act going into effect even under the Constitution of Ohio, and certainly not nuder the Constitution of the United States. The power to prescribe the manner of electing representatives in Congress being alone derived from Sec. 4, Art. I, Constitution of the United States, of course its acts in the premises go into effect at once. It sufficiently appears that a State legislature, in thus prescribing, derives its power solely from the Con. of the U. S.

Supra. pp.....
And see: Brief, (S. C. O.) pp. 10-11. 16-18, 23-28. 42-48.

(Legislature—How Constituted.)

In the court's opinion it is said that:

> "While the legislative power has been delegated to the bi-cameral body composed of the senate and house of representatives, the people of Ohio have by * * provisions of their constitution determined the **manner** by which such legislative power may be exercised, under what circumstances the laws passed by it may become operative without an appeal to the people, and have further imposed the conditions under which such laws may become operative or inoperative as they may have been adopted or rejected by the popular vote designated as the referendum."
>
> Record, p. 23.

The foregoing statement affirms that the Ohio constitution has expressly provided that a senate and house of representatives shall constitute its legislature with authority to pass laws, yet the people of Ohio have withheld from it the right to pass a law without their subsequent right, by petition and vote, to delay its going into effect, and to reject it, notwithstanding the Constitution of the United States grants to the legislature an absolute right to legislate on the subject. The people of Ohio never possessed any right relating to the election of representatives in congress to reserve.

If the power to prescribe the "times, places and manner" of electing representatives to Congress may be taken away from the legislature or controlled by State constitutions then that which is thus assumed may have force.

The authorities are practically unanimous as to such power. That a petition or popular vote is no part of the legislature of Ohio should be conceded; that neither par-

ticipate in enacting laws by the legislature is absolutely clear. Petition and referendum vote can, under Ohio's constitution, be used only to reject laws **after** passage. It is worse than misleading to say that laws enacted in Ohio

> "become operative or inoperative as they may have been adopted or rejected by the popular vote."

No law of the Ohio legislature requires, before taking effect, a vote of any kind by the people either under the constitution of the state or United States. No argument is needed to show that an agency that has no part in enacting a law is no part of the legislature that enacts it. A mere rejecting power is not a creating power.

III

(Apportionment Act (1911) Did Not Supersede the Constitution of the United States.)

Syllabus **three** forces us to the conclusion that the court regarded the foregoing propositions as mere abstraction, having little or nothing to do with the determination of this case; that it is alone determinable on the supposed "grant of power" to be found in the apportionment act of Congress of August 8, 1911, treating it as superseding the grant of power in the Constitution of the United States; and going one long step in advance by authorizing legislatures to make re-districting laws which are subject to be rejected by referendum, although the Constitution of the United States otherwise provides.

This syllabus (3) assumes that:

> "Under the latter clause of Section 4, Article I of the United States Constitution, complete and plenary power over State legislation enacted thereunder

> rests in the Federal Congress, and its laws supersede all State regulations upon the same subject."
>
> Record, p. 20.

There is no possible authority in that clause for saying there exists anywhere "plenary power" over "State legislation enacted" under said Section. No authority of courts, Congress, statesmen or law writers has been found supporting such fallacy, but much to the contrary; the language used in the clause does not warrant the conclusion. It does provide that

> "Congress may at any time **by law** make or alter such regulations, except as to the place of choosing senators."

Not a word is said about Congress authorizing or regulating legislatures to pass a law of any kind or in any manner or with the aid of other agencies or subject to any agency's right to reject or veto it.

(No agency participated with the legislature in passing the law in question.)

Chief Justice Waite belittles the question of Congress having a right to interfere with state laws authorized to be enacted by their legislatures.

He adds that

> "The power of the state in this particular is certainly supreme until Congress acts."
>
> Minor v. Happersett, 88 U. S. (21 Wall) 171

Congress must always, as the clause provides, act "**by law**" in making or altering the regulations of a State on the subject; it cannot, "by law", authorize a State legislature to act in a particular manner, or to act with outside agency authorized to reject its action.

That Congress must, itself, make or alter, **by law**, acts of legislatures, and cannot require state legislatures to

provide in a particular way for electing representatives, is settled by this court.

Ex parte Seibold, 100 U. S. 371, Syl. 8.
And see opinion of Justice Bradley speaking for the court, pp. 383-4.

And Justice Field, for the minority of the court, concurred on this point.

2 Hind's Prec. Sec. 247, p. 240.

The clause presupposes Congress will, by law, make regulations to take the place of or to alter such regulations as State legislatures have made. How could Congress alter legislation not existing?

The court treated the clause as authorizing Congress to, in advance, require legislatures of states to make redistricting laws of a particular kind, and always subject to be rejected and never going into effect. The effect of this would be to provide an agency which may prevent legislatures from passing any re-districting act at all. If the court's view is sound, Congress has power to provide what shall constitute state legislatures, and that they may be constituted wholly different from the legislatures referred to in the Constitution of the United States.

Senator Stephen A. Douglas, in a celebrated contested election case, made a majority report which involved the power of Congress.

"to instruct the State legislatures in respect to the **manner** in which they shall perform their duties."

It reads in part:

"We have searched the Constitution in vain for such power."

* * * * * *

"The power of the States, in this respect, is as absolute and supreme as that of Congress, subject to

the provision that **Congress may change or suspend their action, by substituting its own in lieu thereof.**"

"Whatever power the legislatures possess over elections, they **derive from the Constitution,** and not from the laws of the United States. Congress has no more authority to direct the form of State legislation than the States have to dictate to Congress its form of action. Each is **supreme** within the sphere of its own peculiar duties; clothed with the power of legislation, and a discretion as to the manner in which it shall be exercised, with which the other cannot interfere by ordering it to be exercised in a different manner."

1 Bart. Con. Elec. Cases, p. 52.

In this opinion, in a report in the same case, Senator Garrett Davis (Ky.) concurred (as did the whole committee and the Senate) using equally strong language.

For quotations from both reports,
See Brief (S. C. O.) pp. 42-43.

We refrain from freely commenting on the attempt in the opinion to find authority in remarks of a distinguished Senator, while the 1911 apportionment act was being considered, for now regarding the law passed as setting aside the plain provisions of the Constitution of the United States.

Record, pp. 25-6.

The remarks were most probably made by the Senator (not a lawyer) without previous thought or examination. He characterized the bill as "**bad**", unless amended, because it provided for redistricting only one way—that is, the way authorized by the Constitution—by the legislature. He used this language:

"Do it only one specified way; that is by your **legislature,**" wheras, if his amendment was adopted,

authority would be given to "proceed and district your State in accordance with your laws."

Record, p. 26.

That is, redistrict the State as, and in the manner, the laws of the State authorize, subject to not doing so at all, through referendum, which may wholly set aside the absolute right to legislate on the subject as the Constitution of the United States provides.

(Ohio had no law relating to redistricting.)

And a referendum vote is not even required to prevent a legislature from redistricting for ninety days before a regular Congressional election. A law for the purpose, if referendum applies, would not go into effect if passed within ninety days of such election.

Con. of Ohio, Art. II, Sec. 1c.

And such vote is not required if such law were passed seventeen months before such election, provided only six per cent of those voting for Governor at the last preceding election petitioned for a vote on the law.

Con. of Ohio, Art. II, Sec. 1c, 1g.

This feature of referendum we have reviewed in our Brief (S. C. O.) pp. 6-9.

The notable thing, however, is that the provision in the 1911 apportionment Act, provides that states "**should be redistricted in** the **manner provided by the laws thereof.**"

There was not then, theretofore or since, any law, of any kind, in Ohio, or even a Constitutional provision providing the **manner of redistricting** the state, and there never has been.

We suggest, with proper deference, that a law of a state providing the **manner** it should legislate in the

future on a particular subject would not only be void but absurd.

The provision in the 1911 apportionment Act assumed to require legislatures to redistrict states for the election of representatives according to the laws of the states, was based on a mistake of fact as to the existence of such laws and, on the assumption that, if existing, they would be valid and controlling for that purpose.

We are unable to find any constitution of the now forty-eight states that contains any provision fixing the manner of redistricting by its legislature for representatives. So as to their laws.

The matter of so providing was brought up, we find, long ago (1820) by resolution, in a convention to revise the Constitution of Massachusetts. Justice Joseph Story (a member of the convention) who had recently before (1816) written the unanimous opinion of this court covering the question, declared the resolution:

> "Assumes control over the legislature which the Constitution of the United States does not justify. It (the legislature) is bound to exercise its authority according to its own views of public policy and principle; and yet this proposition compels it to surrender all discretion." &c, &c.

Another member of the convention of some note as a constitutional lawyer, Daniel Webster, followed him, saying:

> "Whatsover was enjoined on the legislature by the Constitution of the United States, the legislature was bound to perform, and he thought it would not be well by a provision of this constitution to regulate the mode in which the legislature should exercise a power conferred on it by another constitution."
>
> I Hinds' Prec. p. 653.

This ended the effort to supplant the constitution of the union by the constitution of a state.

> We hav referred to this subject and made fuller quotatio. in our .... Brief (S. C. O.) pp. 16-17.

In the case just referred to, Justice Story uses this language:

> "The language of the Constitution is imperative as to the performance of many duties. It is imperative on the State legislatures to make laws prescribing the times, places and manner of holding elections for senators and representatives, and for electors of president and vice president."
>
> Martin v. Hunter, 1 Wheaton, 304.

If a state constitution cannot take from a state legislature a grant of power given by the Federal Constitution, how could state laws, (if there were such) or other authority, take away such power?

It is notable that if the 1911 apportionment Act may be construed as directing state legislatures to make lawe of a particular kind, such as to provide for electing representatives in congress by districts; that candidates shall be nominated in a particular manner, &c., such legislation has no warrant.

Since the famous election cases (1843) of the New Hampshire, Georgia, Mississippi and Missouri members it has been understood as practically settled that congress had no such power.

The question was whether those claiming seats by virtue of an election on a **general ticket** were duly elected, the apportionment act (1842) providing that representatives

> "Shall be elected by districts composed of contiguous territory."

The committee on elections was (Dec. 20, 1843), by resolution of the House, directed to

> "inquire and report whether the several members * * * have been elected in conformity with the constitution and law."

It had heretofore (1842) declared members entitled to seats although laws of Congress required their election by districts.

Mr. Douglas of Illinois, for the Committee, (March 15, 1844) submitted a report recommending the adoption of resolutions reading:

> "Resolved, That the second section of "An act for the apportionment of representatives among the several states, according to the sixth census," approved June 25, 1842, is not a law made in pursuance of the Constitution of the United States, and valid, operative, and binding upon the states.
>
> Resolved, that all the members of this House (excepting the two contested cases from Virginia, upon which no opinion is hereby expressed) have been elected in conformity with the Constitution and laws and are entitled to their seats in this House."

There was a conflict between the authority of Congress and the legislatures of the states, arising over the former undertaking to require the latter to prescribe the manner, etc., of electing representatives.

The report concludes:

> "that the convention which formed and the people who ratified that great charter of our liberties intended that the regulation of the times, places, and manner of holding the elections should be left exclusively to the legislatures of the several states, subject to the condition, only, that Congress might alter the state regulations, or make new ones in the event that the states should refuse to act in the premises, or should legislate in such a manner as

would subvert the rights of the people to a free and fair representation."

The report is highly instructive on the history of Section 4, Article I of the Constitution; also on how Congress must exercise the power given it by such section and why it possessed no power

> "to compel state legislatures to change laws or make new ones," and that "Congress might not direct the form of state legislation, or require enactments to be made in compliance to prescribed forms.'"

The form of the resolutions submitted was changed, but not their substance; and then adopted. and the members from each of the states were declared duly elected.

> For some history of these cases,
> See: 1 Hinds' Prec. pp. 170-3, Sec. 310.

This court has held, unanimously, that state legislatures, by virtue of Clause 2, Sec. 1, Art. II, Con. U. S.,

> "have exclusive power to direct the **manner** in which the electors for president and vice-president shall be appointed."

The power thus conferred is substantially the same as that conferred on legislatures by Sec. 4, Art. I, Con. U. S.

> McPherson v. Blacker, 146 U. S. 1, 33-36.

There have been cases of some doubt arising over the proper district in which to elect representatives when vacancies have occurred **after** an act was passed changing the boundaries of districts.

It seems to have been uniformly held that a legislature had the right to pass, as often as it chose, a districting bill to go into effect at once and for all future elections. The contested election case (1850) of Perkins v.

Morrison (N. H.) is one of this class. Morrison, elected from the new and changed district, was seated. The committee report covers a good general discussion of the right of legislatures to prescribe "times, places and manner" of electing representatives, uncontrolled by congress, &c.

I Hinds' Prec. pp. 173-4.

The case of Pool v. Skinner (N. C., 1884) is like the preceding one, and the report thereon is also instructive.

I Hinds' Prec. 175-180.

It remains to say that neither the Constitution of the United States or State of Ohio undertakes to vest power in the legislature to make such laws as it chooses on any subject. It is provided in the Constitution of Ohio that

> "The election and appointment of all officers, and the filling of all vacancies not otherwise provided for by this Constitution or the Constitution of the United States, shall be made in such manner as **may be directed by law.**" Art. II, Sec. 27.

This Ohio provision recognizes constitutional power as exclusive under the Constitution of the United States whenever it speaks.

This question of the power of Congress to direct State legislatures has frequently been decided.

Richardson v. McChesney, 128 Ky. 363.
And see on the subject:
Reply Brief (S. C. O.) pp. 3-9.

If the apportionment act had (as it did not) undertaken to authorize state legislatures to prescribe **by law** the manner of electing representatives, it would have meant nothing, as they already had that authority. If

such act had provided that state legislatures should so prescribe only on condition that their laws were not rejected by a popular vote (referendum) the provision would be **void** as that would have given them only conditional power to legislate effectively on the subject.

If such act provided no redistricting law of a legislature should take effect unless approved by a referendum vote of the people of the State, it would also have been **void,** because violative of the Constitution of the United States.

Suppose such act had provided that legislatures of States should have no right to pass any redistricting law during ninety days before a regular congressional election, to take effect before such election, it would obviously have been **void.**

This is exactly the effect of referendum under Sec. 1c, Art. II, Con. of Ohio.

If such Act provided that no redistricting act should be passed within seventeen months of such election to go into effect within that time, provided six per centum of those voting for Governor at the preceding election petitioned for a vote thereon, the provision would be **void,** because violative of constitutional power. Whatever could not be done directly could not be done indirectly. But, as we have seen, the act undertook to grant no power to legislatures to the **manner** of prescribing for the election of representatives in congress, and, mistakenly, undertook to confer on legislatures the right to pass laws in the manner existing state laws permitted, and there were no such laws.

Finally, it would follow, if the apportionment Act did declare, as the state court seems to hold, that state **legislatures** are authorized to form districts **"in the manner provided by the laws thereof"**, that referendum would be excluded thereby, as it is a provision of the **Constitution** of Ohio.

In the court's opinion it is said:

> "In disposing of the case Chief Justice Fuller said:
>
> "The legislative power is the supreme authority except as limited by the constitution of the state, and the sovereignty of the people is exercised through their representatives in the legislature unless by the fundamental law, power is elsewhere reposed.
>
> Record, p. 25.

The fundamental law referred to was the Constitution of the United States, and "no power is elsewhere reposed" by it, or the people. This quotation is found in an early part of the Chief Justice's opinion, not in "disposing of the case."

It would have been illuminative to have given us the short sentence immediately preceding the one quoted, reading:

> "The State does not act by its people in their collective capacity, but through such political agencies as are constituted and established."

Also a sentence closely following that quoted:

> "The clause under consideration does not read that the people or the citizens shall appoint, but that each state shall, &c."

And again:

> "The prescription of the written law cannot be overthrown because the States have latterly exercised in a particular way a power which they could have exercised in some other way."
>
> Supra, 146 U. S. (36).

Chief Justice Fuller had before spoken plainly, defining the sovereign power of the people in our republican form of government, to

> "pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves," &c.
>
> In re Duncan, 139 U. S. (161)

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Attorneys for Plaintiff.

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Argument.

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IN THE

Supreme Court of the United States

October Term 1915.

No. 987.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS, ET AL.

BRIEF OF DEFENDANTS.

STATEMENT OF CASE.

The sole question in this case is whether an act by a state to redistrict the state for the purpose of holding elections for representatives to Congress is to be enacted in the same manner as other state laws. Concretely: Is such an act passed by the legislature of the state of Ohio subject to referendum provided for in Article II of the Constitution of Ohio?

On account of the shortness of time counsel for relator have not been able to get a copy of their brief to us prior to our preparing this one, but we have been assured that the brief in this court will follow the same lines as the one in the state court.

As meeting all of the arguments set forth in their brief in the state court we respectfully submit two propositions for which we contend, viz:

1. The words "by the legislature thereof," as used in Section 4 of Article I of the Constitution of the United States, refer to the **legislative power of a state as fixed by the state constitution.**

2. Congress has acted under said Section 4 of Article II, and in the act of August 8, 1911, (U. S. Comp. Stat. 1913, Volume 1, Title 2, Chap. II, Section 18) has deliberately and for the purpose of leaving no question about such state legislation being subject to the referendum in states having a referendum, changed the words "by the legislature thereof in the manner herein prescribed," which had been the law down to that time (Section 4 of the act of January 16, 1901, U. S. Comp. Stat. 1901, Vol. I, Chap. II, Section 20, Subsection 4), to "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act." (See amendment offered in senate of Sixty-second Congress: Congressional Record(Vol. 47, Part 4, page 3436; passed, p. 3556.)

The decision herein calls for an interpretation of:

(1) Section 4, Article I of the Constitution of the United States which provides as follows:

> "The times, places and manner of holding elections for senators and representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter

such regulations, except as to the places of chusing senators."

(2) Section 1 of Article II of the Constitution of Ohio, as amended September 3, 1912, which provides as follows:

"The legislative power of the state shall be vested in a general assembly consisting of a senate and house of representatives but the people reserve to themselves the power to propose to the general assembly laws and amendments to the constitution, and to adopt or reject the same at the polls on a referendum vote as hereinafter provided. They also reserve the power to adopt or reject any law, section of any law or any item in any law appropriating money passed by the general assembly except as hereinafter provided, and independent of the general assembly to propose amendments to the constitution and to adopt or reject the same at the polls. The limitations expressed in the constitution, on the power of the general assembly to enact laws, shall be deemed limitations on the power of the people to enact laws."

Section 1c of Article II of the Constitution of Ohio, as amended September 3, 1912, provides as follows:

"The second aforestated power reserved by the people is designated the referendum, and the signatures six per centum of the electors shall be required upon a petition to order the submission to the electors of the state for their approval or rejection, of any law, section of any law or any item in any law appropriating money passed by the general assembly. No law passed by the general assembly shall go into effect until ninety days after it shall have been filed by the governor in the office of the secretary of state, except as herein provided. When a petition, signed by six per centum of the electors of the state and verified as herein provided, shall have been filed with the secretary of state within ninety days after any law shall have been filed by the governor in the office of the secretary of state, ordering that such law, section of such law

or any item in such law appropriating money be submitted to the electors of the state for their approval or rejection, the secretary of state shall submit to the electors of the state for their approval or rejection such law, section or item, in the manner herein provided at the next succeeding regular or general election in any year occurring subsequent to sixty days after the filing of such petition, and no such law, section or item shall go into effect until and unless approved by a majority of those voting upon the same. If, however, a referendum petition is filed against any such section or item, the remainder of the law shall not thereby be prevented or delayed from going into effect."

(3) And the following federal statutes:

The act of August 8, 1911, Chapter 5, Section 3: (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap. II, Sec. 17.)

"In each state entitled under this apportionment to more than one representative, the representatives to the sixty-third and each subsequent Congress shall be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of representatives to which such state may be entitled in Congress no district electing more than one representative."

Section 4 of the same chapter of the same act provides:

"In case of an increase in the number of representatives in any state under this apportionment such additional representative or representatives shall be elected by the state at large and the other representatives by the districts now prescribed by law until such state shall be redistricted in the manner provided by the **laws thereof** in accordance with the rules enumerated in Section 3 of this act; and if there be no change in the number of representatives from a state, the representatives thereof shall be elected from the districts now prescribed by law until such state shall be redistricted as herein prescribed."

Section 5 of said act provides:

> "Candidates for representative or representatives to be elected at large in any state shall be nominated in the same manner as candidates for governor, **unless otherwise provided by the laws of such state.**"

Section 25, R. S. U. S. (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap. II, Section 21,) provides:

> "The Tuesday after the first Monday in November in the year 1876 is established as the day in each of the states and territories of the United States for the election of representatives and delegates to the Forty-fifth Congress; and the Tuesday after the first Monday in November in every second year thereafter is established as the day for the election in each of the said states and territories of representatives and delegates to Congress, commencing on the fourth day of March next thereafter."

Section 27, R. S. U. S. (U. S. Comp. Stat. 1913, Vol. I, Title 2, Chap II, Sec. 24,) provide:

> "All votes for representatives in Congress must be by written or printed ballot or voting machine the use of which has been duly authorized by the state law; and all votes received or recorded contrary to this section shall be of no effect."

The last apportionment of representatives made by Congress was in the act of August 8, 1911, Chapter 5, Sec. 1. (U. S. Comp. Stat. 1913, Vol. 1, Title 2, Chap. II, Sec. 15.)

ARGUMENT.

I.

Taking up first Section 4 of Article I of the Federal Constitution let us attempt by the process of elimination to ascertain its intent. Let us find out first what it does not mean. A simple way of making such an investigation is by questions and answers.

Does said Section 4 of Article I authorize the **legislative body** of a state to prescribe the time, place and manner of holding elections or is the authority delegated to the members of such legislative body? Clearly the answer is that the authority is given to the legislative body as a body rather than to the members as members.

Then arises the question:

DOES THE LANGUAGE OF SAID SECTION REFER ONLY TO A BICAMERAL BODY?

Counsel may argue that because Section 2 of Article I of the Federal Constitution refers to the most numerous branch of the state legislature, a legislative body consisting of two branches was referred to in Section 4. But when we stop to consider that both at the time of the adoption of the Federal Constitution as well as subsequent thereto there existed different types of legislatures, such argument falls. The Continental Congress consisted of but one body. The colonies presented several different types of legislatures. Pennsylvania, Georgia and Vermont adopted the scheme of a single body as the depositary of legislative power.

> "It has been already stated that Pennsylvania in her first constitution adopted the scheme of a single

body as the depositary of the legislative power, under the influence, as is understood, of a mind of a very high philosophical character. Georgia also is said in her first constitution, (since changed), to have confided the whole legislative power to a single body. Vermont adopted the same course giving however to the executive council a power of revision and of proposing amendments to which she still adheres."

(Story Commentaries on the Constitution, Volume 1, Section 548, page 408).

The following is a note to be found in Bryce on the American Commonwealth, Volume 1, Part 2, Chapter XL, page 484:

"It deserves to be remarked that the Pennsylvania constitution of 1786, the Georgia constitution of 1777 and the Vermont constitution of 1786 and 1793, **all of which constituted one house of legislature only,** provided for a second body called the executive council, which in Georgia had the duty of examining bills sent to it by the House of Assembly, and of remonstrating against any provisions they disapproved, and in Vermont was empowered to submit to the assembly amendments to bills sent up to them by the latter, and in case the assembly did not accept such amendments, to suspend the passing of the bill till the next session of the legislature. In 1789 Georgia abolished her council and divided her legislature into two houses; Pennsylvania did the same in 1790; Vermont in 1836. Both Pennsylvania and Vermont had also a body called the Council of Censors, who may be compared with the Nomothetae of Athens, elected every seven years, and charged with the duty of examining the laws of the state and their execution, and of suggesting amendments. This body was abolished in Pennsylvania in 1790, but lasted on in Vermont till 1870."

The following is taken from the text of Story on the Constitution, Section 560, page 416:

"In the convention which framed the constitution, upon the resolution moved, 'that the national

legislature ought to consist of two branches,' all the states present, except Pennsylvania, voted in the affirmative. At a subsequent period however seven only of eleven states present voted in the affirmative. three in the negative and one was divided. But although in the convention this diversity of opinion appears, it seems probable that ultimately when a national government was decided on, which should exert great controlling authority over the states, all opposition was withdrawn, as the existence of two branches furnished a greater security to the lesser states. **It does not appear that this division of the legislative power became with the people any subject of ardent discussion or of real controversy.** If it had been so, deep traces of it would have been found in the public debates instead of a great silence. The Federalist touches the subject in but few places, and then principally with reference to the articles of confederation and the structure of the senate."

In the ordinance of 1787 in Section 11 thereof Congress provided: (Continental)

"The general assembly or legislature shall consist of a governor, legislatve council and a house of representatives. The legislative council shall consist of five members to continue in office five years unless sooner removed by Congress; any three of whom to be a quorum: and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together and when met they shall nominate ten persons resident in the district and each possessed of a freehold in five hundred (500) acres of land and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid."

This legislative provision was clearly patterned after one of the colonial types.

The only reasonable conclusion to the last suggested question is that Section 4 of Article I was meant to em-

brace whatever legislative body might be provided for by the constitution of the particular state.

Another question suggests itself:

WAS SECTION 4 OF ARTICLE I MEANT TO REFER ONLY TO A REPRESENTATIVE BODY?

Helpful in this connection are the answers to two subsidiary questions:

(a) How was the "legislature thereof" to prescribe the time, place and manner of holding elections?

To this question the only reasonable answer that may be given in the light of practice as well as reason is that the "legislature thereof" was to act as it did in other legislative matters by enacting a law. We have been unable to find that any attempt was ever made by a legislature to prescribe any of these things otherwise than by law. In the Act of Congress of August 8, 1911, under Section 4 of Article I of the Constitution Congress recognizes therein that the districting of a state is to be provided and prescribed by law.

Then will arise the second subsidiary question:

(b) Is such legislation subject to the check of the governor's veto?

Search through the reports fails to disclose that the governor's right to veto such legislation was ever questioned. It becomes the duty then to accept the interpretation in practice placed upon this matter since the inception of the Federal Constitution. If then these two subsidiary questions be correctly answered it must become quite patent that the "legislature thereof" was to act as it did in other cases by enacting laws in the regular manner prescribed by the state constitution for the enactment of laws.

The answer then to the main question last above suggested is that Section 4 of Article I of the Federal Constitution refers to the power in the state which exercises the function of legislation; and we are to look to the constitution of the state to find where is lodged the legislative power.

A search through the reports of the courts of last resort show but one case which is really in point, that being the case of State of South Dakota, ex rel. John F. Schrader vs. Samuel C. Polley, as secretary of state, reported in 26 S. D. at page 5 and in 127 N. W. at page 848. The following statement of the case is copied from the report of the attorney general of South Dakota for 1909-1910 at page 34:

> "This was an original proceeding in the State Supreme Court for a writ of mandamus to compel the defendant to certify to the several county auditors the question of nominating congressional candidates by districts. Under the provisions of Chapter 223 of the Session Laws of 1909 the state was divided into two congressional districts. However, the provisions of the referendum law were invoked and a petition was filed to refer this law to the voters of the state. The question involved in this case was the right of the electors of the state to suspend the operation of such law pending a popular vote on the question. The petition for writ of mandamus was denied, the court holding that the provisions of the referendum applied as well to this as to any other law."

In the course of the opinion the court said:

> "We are also of the opinion that the word 'legislature' as used in Section 4, Article I, of the Federal Constitution, does not mean simply the members who compose the legislature, acting in some ministerial capacity, but refers to and means the law-making body or power of the state, as established by the state constitution, and which includes the whole constitutional law-making machinery of

the state. * * * Under the constitution of this state, the people, by means of the initiative and referendum, are a part and parcel of the law-making power of this state, and the legislature is only empowered to act, in accordance with the will of the people as expressed by the vote, when the referendum is properly put in operation. The term 'legislature' has a restricted meaning which only applies to the membership thereof, and it also has a general meaning which applies to that body of persons within a state clothed with authority to make the laws (Bouvier's Law Dic.; Webster's Dic.; 18 Am. & Eng. Ency., 822; 25 Cyc., 182), and which, in this state, under Section 1, Article 3, Const. S. D., includes the people. Therefore we are of the opinion that in the passage of this act dividing the state into two congressional districts, by the law-making power of this state, it was necessary that such law be pasesd according to the contitutional provisions of this state, and that the referendum was applicable thereto."

In the brief of counsel for relator in the state court reliance was placed upon the case of McPherson v. Blacker, 92 Mich., 377, and the same case in the United States Court, 146 U. S., 1.

It is respectfully submitted that there is nothing in the decisions of these cases nor in the opinions of the courts which is inconsistent with our claims in the case at bar. All that was held by the Supreme Court of the United States and by the Supreme Court of Michigan was that the question was one for the legislature. Neither of these courts attempted to define either the legislature or legislative power.

As said by Justice Cooley in the case of Bay City vs. State Treasurer, 23 Mich., 499, constitutions "in the main only undertake to lay down broad general principles," and that the court should not, in order to aid evasions and circumventions, resort "to a literal and technical construction, as if they were great public enemies standing in the way of progress * * * *"

Only by a strained, unnatural construction could it be held that Section 4 of Article I of the Federal Constitution refers to the members of the legislature rather than to the legislative power of the state. As said Section 4 undoubtedly refers to the legislative power of the state we must look to the constitution of the state to find the definition of that legislative power. In Ohio this is found in Section 1 of Article II of the State Constitution, as amended September 3rd, 1912.

2.

Under the provision of Section 4 of Article I of the Federal Constitution "but the Congress may at any time by law make or alter such regulations, except as to the places of chusing senators," Congress from time to time since 1842 has enacted apportionment election laws which provided that the state should be divided into contiguous and compact territory. (5 Statutes at Large, 491; McPherson v. Blacker, 146 U. S., p. 1-26.)

In the act of February 7, 1891, (17 Statutes at Large, 28), there was a provision that "election of representatives to the Forty-third Congress * * * shall be elected by the districts as now prescribed by law in said state unless the legislature of said state shall otherwise provide * * *."

In the act of February 7, 1891, (26 Statutes at Large, 735) the following language was first used:

> "And other representatives by districts now prescribed by law until the legislature of such state in the manner herein prescribed shall redistrict such state."

This same language was carried into Section 4 of the act of January 16, 1901, which act immediately preceded the present act of August 8, 1911. Section 4 of that act

provided (U. S. Comp. Stat. 1901, Vol. I, Chapter 2, Section 20, Subsection 4):

> Sec. 4. "That in case of an increase in the number of representatives which may be given to any state under this apportionment such additional representative or representatives shall be elected by the state at large, and the other representatives by the districts now prescribed by law until the **legislature of such state in the manner herein prescribed, shall redistrict such state**; and if there be no increase in the number of representatives from a state the representatives thereof shall be elected from the districts now prescribed by law until such state be redistricted as herein prescribed by the legislature of said state; and if the number hereby provided for shall in any state be less than it was before the change hereby made, then the whole number to such state hereby provided for shall be elected at large, unless the legislatures of said states have provided or shall otherwise provide before the time fixed by law for the next election of representatives therein."

When it came to the enactment of the act of August 8, 1911, (the present statute) after considerable debate in both the house and senate the words "by the legislature thereof in the manner herein prescribed," which had been carried in the law since 1891, were stricken out and in lieu thereof there were inserted the words "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act."

This amendment was for the declared purpose of making acts of the legislature redistricting the states (commonly called gerrymander acts) subject to the referendum provisions of the various state constitutions.

The foregoing amendment was offered in the senate by Mr. Burton of Ohio on August 1, 1911. (Congressional Record, Sixty-second Congress, Vol. 47, Part 4, page 3436).

In offering this amendment Senator Burton said: (Vol. 47, Part 4, Congressional Record, page 3436)

Mr. Burton: * * *

"The other amendment which I have proposed requires perhaps a somewhat more extended explanation. It is this: On page 4, line 15, after the word 'redistricted,' strike out the words 'by the legislature thereof in the manner herein prescribed,' and insert in lieu thereof the words:

> In the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act.

This amendment pertains to the dividing of the several states into districts and to the manner in which this shall be done. Section 3 contains this clause:

> That in each state entitled under this apportionment to more than one representative, the representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants.

The next section—Section 4—provides that representatives "shall be elected from the districts now prescribed by law until such state shall be redistricted by the legislatures thereof in the manner herein prescribed." "The manner herein prescribed" means that the district shall be composed of contiguous and compact territory and contain as nearly as practicable an equal number of inhabitants, as expressed in the prior section.

I desire to call attention to the fact that as the bill passed the house in the preceding Congress it did not contain this clause or expression, "by the legislature thereof."

Mr. President, whatever our views may be on the subject of the initiative or referendum we cannot ignore

the existence of statutes in divers states of the Union under which they are the recognized methods of enacting laws. Under such circumstances what is the effect of this expression, "by the legislature thereof"? It is a distinct and unequivocal condemnation of any legislation by referendum or by initiative. It is a mandate to the states to this intent: Whatever your laws may be for the enactment of statutes, yet in the division of the state into congressional ditricts you must act by the legislature alone, even if under the laws a trivial question can be submitted to the whole electorate, nevertheless in this very important matter of dividing the state into districts the legislature alone shall have full authority.

At first sight, in reading this section and finding the words "by the legislature thereof," it would seem to be an oversight. Whether it is or not, I am unable to say; but in any event it does not belong here. A due respect to the rights, to the established methods, and to the laws of the respective states requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes.

* * * * * *

If you have a referendum in a state the object of which is to submit to the people at large the question of whether or no a statute shall stand, the question whether it is just or unjust, that provision ought especially to apply to a law dividing a state into districts, where there is such an opportunity for monstrous injustice. If there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill.

Senators on the other side, and on this side as well, have of late addressed the senate ardently advocating the principle of the referendum and the initiative. I shall be interested to know whether they will permit the restriction, "by the legislature thereof," to remain in this statute. If you believe in the principle, stand by the principle and do not take that very inconsistent and ab-

surd position, "We are for the rule, but we are against the application thereof."

I take it the object sought by the amendment I have proposed could be secured by merely striking out the words "by the legislature thereof," but if it is to be amended I think it is desirable to make both the substituted and the folowing words more definite. So I have suggested that the senate strike out the words "by the legislature thereof in the manner herein prescribed," and insert in lieu thereof, first, the words "in the manner provided by the laws thereof." This gives to each state full authority to employ in the creation of congressional districts its own laws and regulations. What objection can be made to a provision of that kind? Pass this amendment, and you will transmit to each state the message "Proceed and district your state in accordance with your laws." This act does not do that. It sends the message, "Do it in only one specified way; that is, by your legislature."

On the following day, August 2, the debate was resumed in the senate (Vol. 47, Part 4, Congressional Record, page 3507).

Senator Burton speaking:

"I desire to repeat briefly the arguments for the first amendment that I proposed yesterday, namely, to strike out the words 'by the legislature thereof in the manner herein prescribed,' as a method for districting states, and to insert in lieu thereof the words: 'In the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act.'

What right have we, Mr. President, in the face of different methods and laws pertaining to the enactment of legislation--some states acting by the legislature, others acting by the legislature but subject to a referendum—to fix one inflexible way and require that every state shall be divided into congressional districts in that manner."

Mr. Shively: "In that respect is it not a fact that this bill repeats substantially the language that has been em-

ployed in all reapportionment acts in all these years? **And if the senator will permit me further, is not the language sufficient to allow, whatever the law of the state may be, the people of that state to control the matter? If they have arranged that legislative action shall be submitted to a referendum, the phraseology of the pending bill does not interfere with that procedure.''**

Mr. Burton: ''Answering the last suggestion first, that if a state sanctions the use of the referendum this provision has no effect, I will ask why leave it in, then? I think it does have effect. Congress may determine the time, place and manner of electing members of the house of representatives.''

* * * * * *

Page 3508.

Mr. Burton: ''* * * In several states,—I was about to say in numerous states—the referendum has been adopted. It was very natural in 1890 and even in 1900 that a provision should be incorporated that the state should be redistricted 'by the legislature thereof' because that was the only law-making power; but since then a new method of making laws has been devised, and we cannot afford to cling either to obsolete phraseology, or, in our dealing with the states to adhere to obsolete methods; that is, to ignore their methods of enacting laws.''

Mr. Shively: ''Mr. President, it is not a matter of adhering to obsolete methods or dealing with obsolete phraseology. I am entirely willing that a state shall determine what shall be the rule of apportionment within that state, **but I still insist that the language of this bill does not prohibit the legislature from arranging the districts by referendum of the act to the people.''**

* * * * * *

Mr. Burton: ''* * * I will say to the senator from Indiana—and it is a point of some importance in this connection—that the bill which passed the house of representatives last winter and came over to the senate did

not contain the phraseology 'by the legislature thereof'. Those words have been inserted since.

It was determined last winter that the question should be left open to the laws and regulations of the respective states. Why, after it had been once passed by the house, was it thought best to put in this phraseology, 'by the legislature thereof'?"

* * * * * *

Mr. Clapp: **"Mr. President, I want to suggest to the senator from Ohio, in response to the suggestion of the senator from Indiana, that a legislature in a state where the initiative and referendum is in vogue would be derelict if it did not submit a matter to the referendum that, so far as my knowledge of the law relating to the initiative and referendum is concerned, the legislature absolutely has nothing to do with."**

Mr. Burton: "I am inclined to think that is the case in several states."

Mr. Clapp: "I know that is the case in some states. There is no question about that."

Mr. Shively: "In which event it could have nothing to do with this."

Mr. Clapp: "That is just the object of the amendment of the senator from Ohio."

Mr. Shively: "No."

Mr. Clapp: "To put it wherever it would be under the law of that state."

Mr. Shively: "If you have a referendum in the state that applies to general legislation adopted by the legislature of that state, and the law of that state requires that such legislation shall be submitted to a referendum, of course it applies here. * *"

Mr. Clapp: "The law of the state in that case does not require the legislature to submit anything to the people."

* * * * * *

Mr. Works: "The right of referendum in the people does not come from the legislature at all. The legislature has no power over it. They cannot delegate it to

the people. It must come from a constitutional provision; and the same is true with respect to the initiative. Legislative power in the hands of the people could only be given by a constitutional provision. Therefore, so far as the referendum is concerned, it is entirely independent of any action by the legislature, and if this provision is made in the way it appears in the bill at the present time, then as a matter of course the power would be given directly to the legislature."

Mr. Burton: "And no other regulation or law could be utilized."

Mr. Works: "I will say to the senator from Indiana that if he really desires that this right shall be given to the people, by way of referendum, he is taking some chances in allowing the bill to be pasesd in its present form."

Mr. Burton: "The senator from California has clearly stated the case as I understand it. Of course, there are cases where the legislature has the option of leaving the question to the people to be voted upon by a quasi referendum, but that is not the usual method.

Now, I again call attention to the impression which would be conveyed if we were to retain these words 'by the legislative thereof.' The bill as it passed the house last winter omitted them. The bill as it passed the house at this session included them. That is not without meaning. And under the power which Congress has to determine the time, place, and manner of holding congressional elections, I understand it could divide a state into districts. It could deputize that right, perhaps, to the governor or to an executive board, and it could give over that right to the legislature. So I regard this provision as an infringement on the rights of the states, and one which we should strike out, leaving them to their own methods and laws. * * *

I also ask that members vote against the bill if this amendment cannot be adopted. * * *"

On August 3, 1911, (page 3555) when the bill came up for a vote Senator Burton again offered the above-men-

tioned amendment to strike out the words "by the legislature thereof in the manner herein prescribed," and to insert in lieu thereof the words "in the manner provided by the laws thereof and in accordance with the rules enumerated in Section 3 of this act." The amendment was carried, yeas 39, nays 28, not voting 23, 6 of the paired members not voting stating that if the other member of their pair were present they would vote yea, and only one stating that in such event he would vote nay. The bill as finally adopted of course contains Senator Burton's amendment.

This issue was also squarely raised in the house as will be found on consulting the Congressional Record of the Sixty-second Congress, Vol. 47, Part 1, page 673 et seq.

Mr. Crumpacker, directing his remarks to Section 4 of the bill, said:

Mr. Crumpacker: "Now, the words 'by the legislature thereof' were not in the bill as it passed the last Congress. They were put in by the committee, but the house struck them out. They are incorporated in this bill. What is its effect? In the discussion of the campaign publicity bill some days ago, when reference was made to the question of primary elections and things of that kind, gentlemen on the other side said, 'Leave those questions to the states.' I think under the act of 1901 this clause was in the bill. Up to that time there had been no other method established by any state in the Union for the redistricting, except by the legislature thereof. Since then a number of reforms have been accomplished; a number of states in the Union have established the institution of initiative and referendum. Some states are so equipped with the law-making machinery that they can legislate; they can redistrict their territory for congressional purposes without the aid or assistance of the legislature. Voters may initiate propositions, and they may refer them to the people. This provision, if it has any effect at all, will prevent those states from exercising that great function of redistricting their

states for congressional purpoes by the initiative and referendum altogether. * * * * *

(Near top page 674.)

Representatives of states that have the initiative and referendum, are you willing to say that the people of your states may have the final determination of all legislation excepting the creation of congressional districts, a class of legislation that is more liable to be biased by party advantage than any other legislation? I stand here, Mr. Chairman, in this respect as the champion of the referendum, in the states that have established that institution * * should not the people of those states have the right to pass upon those acts of the legislature."

At page 702 Mr. Bartholdt said:

Mr. Bartholdt: " * * Our proposition is, and the reason for this amendment is, not to tie the hands of the people of Missouri. The Democratic legislature which 10 years ago did the redistricting made districts varying in population by more than 100,000 people; in other words, it violated the federal statute which said that the districts should contain as nearly as practicable an equal number of inhabitants. And because of this flagrant violation of a federal law, and for the further reason that the people desire to take this case in their own hands, we ask you Democrats now to be true to your traditions and to your principles and stand up for state rights on this question and not tie the hands of the people of Missouri if they propose by petition to present to the voters of that state a fair and equitable apportionment scheme. By voting these words into the bill, namely, 'by the legislature thereof,' you will prevent the people of Missouri from doing so. You will tie their hands; you will leave to the legislature again an opportunity to violate the federal statute without any recourse on our part anywhere, either in the state courts or the Supreme Court of the United States. We ask you to be true to the doctrine which you preach, that the people have a right to make use of the initiative and referendum when they cease to have confidence in the legis-

lature, and legislatures are usually controlled, as we all know, by partisan majorities, and it is probably true that both parties are sinning in that respect."

While we have made rather liberal quotation from the Congressional Record, we have by no means attempted to quote all upon this subject. We think we have quoted sufficient, however, to show clearly that the purpose of the amendment was to remove any question about redistricting bills being subject the referendum of the various states.

IS THE QUESTION PRESENTED IN THIS CASE A JUSTICIABLE ONE?

While in the case of McPherson v. Blacker, 146 U. S., page 1, which was a case arising under Clause 2 of Section 1 of Article II of the Federal Constitution relative to the appointment, in such manner as the legislature might direct, of presidential electors, Chief Justice Fuller said:

> "The question of the validity of this act as presented to us by this record is a judicial question and we cannot decline the exercise of our jurisdiction upon the inadmissible suggestion that action might be taken by political agencies in disregard of the judgment of the highest tribunal of the state as revised by our own,"

the trend of judicial decisions seems to be to treat all such matters as the one at bar as political rather than justiciable, and we should not lose sight of the fact that Section 5 of Article I of the Federal Constitution provides:

> "Each house shall be the judge of the elections, returns and qualifications of its own members * * *"

In the case of Richardson v. McChesney, 128 Ky., 363, (108 S. W., 322) the syllabus is as follows:

1. "A legislative apportionment of the state into congressional districts cannot be judicially reviewed in the absence of a constitutional provision controlling apportionment.

2. "The constitution of the United States contains no direction to the state on the matter of apportionment of the state into congressional districts.

3. "There is nothing in the state constitution as to the manner of the apportionment of the state into congressional ditricts."

This case was taken to the Supreme Court of the United States and is found in 218 U. S., 487. It was dismissed by the Supreme Court of the United States upon the ground that the questions therein had become moot.

In the case of Pacific States Telephone and Telegraph Company v. Oregon, 223 U. S., 118, it was held:

"Whether the adoption of provisions for the initiative and referendum in the constitution of a state, such as those adopted in Oregon in 1902, so alter the form of government of the state as to make it no longer republican within the meaning of Section 4 of Article IV of the Constitution, is a purely political question over which this court has no jurisdiction.

The enforcement of the provision in Section 4 of Article IV of the Constitution, that the United States shall guarantee to every state a republican form of government, is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts."

SUMMARY.

Summing up then it is our contention that in the absence of regulation by Congress: The time, place and manner of holding elections for representatives shall be provided in each state by **law**; and that such laws are to be enacted in the same manner as other state laws. Further, we repectfully submit that the Ohio act in question was enacted under and by virtue of the act of Congress of August 8, 1911, which latter act had been amended purposely and by apt language to make action thereunder subject the referendum provisions of the various states; that said act of August 8, 1911, permitted such redistricting to be done only by the passage of a **law**; that according to Article II of the Contitution of Ohio such an act could not become a law without being subject to the referendum provided for in said Article II of the Constitution of Ohio.

We question whether a justiciable issue has been raised in this case.

Repectfully submitted,

EDWARD C. TURNER,
Attorney General of Ohio,
Attorney for Defendants.

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Supreme Court of the United States

October Term, 1915.

No. 982.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES G. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS, AND STATE SUPERVISOR OF ELECTIONS, ET AL.

In Error to the Supreme Court of the State of Ohio.

BRIEF OF COUNSEL FOR PLAINTIFF IN ERROR.

EDMOND H. MOORE,
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THE WERNER LAW PRINTING CO., CLEVELAND, OHIO.

INDEX.

IN THE

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October Term 1915.

No. 987.

THE STATE OF OHIO ON RELATION OF DAVID DAVIS,

Plaintiff in Error,

vs.

CHARLES Q. HILDEBRANT, SECRETARY OF STATE OF OHIO, STATE SUPERVISOR AND INSPECTOR OF ELECTIONS AND STATE SUPERVISOR OF ELECTIONS, ET AL.

BRIEF OF COUNSEL FOR DEFENDANTS.

STATEMENT OF THE CASE.

This case is stated on behalf of the defendants in the brief of Honorable Edward C. Turner, Attorney General of the State of Ohio; and likewise the constitutional provisions involved are therein stated, and the federal statutes involved are therein cited.

The claim of the Plaintiff.

The plaintiff claims that by virtue of Section 4 of Article I of the Constitution of the United States the people of the State of Ohio are without authority to

negative by means of the referendum an act of the General Assembly of the State, prescribing the manner of holding elections for members of the House of Representatives. Said Section 4 of Article I of the Constitution of the United States is as follows:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such regulations, except as to the Places of choosing Senators."

The claim is made that the action of the people in invoking the referendum to negative the congressional redistricting bill does violence to the first clause of said Section 4.

Meaning of "legislature of the State" as used in Section 4 of Article I; First clause of Section 4 of Article I a surrender of power to the State; Story on the Constitution, Volume I, Section 815.

The plaintiff relies upon the contention that by the Legislature of a State is meant only what was understood up to the advent of the Initiative and Referendum as a law-making body composed of men elected by the people for the purpose of giving expression to the sovereign will in so far as the making of laws was concerned; in short, that the Legislature of Ohio would mean the General Assembly within the meaning of that term prior to the adoption of the new Constitution of the State in the year 1912. In our view, the phrase,

"legislature of the State" as used in Section 4 of Article I of the Federal Constitution means the law-making power of the State. In the first place, it will be kept in mind that the Federal Constitution no where seeks to interfere with the States with respect to the distribution of legislative powers in the State. Not a line can be found in the Federal instrument interfering with the full power of the State to distribute the legislative powers as it may see fit. The Legislature of a State may consist of one house, two houses or any number of houses which the people of the State determine upon. When Section 4 of Article I of the Constitution of the United States was adopted, there was no contention over the question of how to get the expression of the State with reference to the election of Representatives. The legislature, that is, a body composed of a limited number of men, represented the supreme will of the State and its sovereign power, and in leaving the question to the legislature of a State it was leaving the question to the State itself. This Section attracted little attention in the convention. It was assailed by the opponents of the Constitution both in and out of the State conventions with uncommon zeal and virulence. The objection was not to that part of the clause which vests in the State legislatures the power of prescribing the Times, Places and Manner of holding elections; for, so far it was a surrender of power to the State government. But it was to the superintending power of Congress to make or alter such regulations. It was said that such a superintending power would be dangerous to the liberties of the people and to the just exercise of

their privileges in elections. (Story on the Constitution, Volume I, Section 815.)

First clause of Section 4 of Article I a concession to the States.

It thus appears that Section 4 was a concession to the States. The contest in the several States in their state conventions was whether the Federal government should be left with a superintending power over the election of Representatives. The contest was over the second clause of Section 4, and not the first clause. If those who violently assailed Section 4 of Article I of the Constitution had in mind that the phrase, "legislature of the State", involved any limitation upon the State beyond the law-making power, the sovereign power, so far as a State agency was concerned, it is reasonable to assume that such limitation would be assailed. If it was understood that the expression, "legislature of the State", had a restricted meaning, it is strange that the opponents of the Constitution in the various State conventions did not make some question in regard thereto.

The federal government does not determine the composition of the state legislature.

The contention of the plaintiff, if carried out, would be that the Federal government by virtue of Section 4 of Article I of the Constitution would have the right to determine for the State what its legislature is. It is not the policy of the Federal government in the plan of its constitution to restrict the people of a State in the exercise of their wish to restrain the legislative power. We

quote from Story on the Constitution, Volume I, Sections 532 and 533.

Section 532 is as follows:

"De Lolme has said with great emphasis: 'It is, without doubt, absolutely necessary for securing the constitution of a state, to restrain the executive power; but it is still more necessary to restrain the legislative. What the former can only do by successive steps, (I mean, subvert the laws) and through a longer, or a shorter train of enterprises, the latter does in a moment. As its bare will can give being to the laws, so its bare will can also annihilate them; and if I be permitted the expression, the legislative power can change the constitution, as God created the light. In order, therefore, to insure stability to the constitution of a state, it is indispensably necessary to restrain the legislative authority. But, here, we must observe a difference between the legislative and executive powers. The latter may be confined, and is even more easily so when undivided. The legislative, on the contrary, in order to its being restrained, should absolutely be *divided*'."

Section 533 is as follows:

"The truth is, that the legislative power is the great and overruling power in every free government. It has been remarked with equal force and sagacity, that the legislative power is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex. The founders of our republics, wise as they were, under the influence and dread of the royal prerogative, which

was pressing upon them, never for a moment seem to have turned their eyes from the immediate danger to liberty from that source, combined as it was with an hereditary authority and an hereditary peerage to support it. They seem never to have recollected the danger from legislative usurpation, which, by ultimately assembling all power in the same hands, must lead to the same tyranny as is threatened by executive usurpations. The representatives of the people will watch with jealousy every enroachment of the executive magistrate, for it trenches upon their own authority. But who shall watch the encroachment of these representatives themselves? Will they be as jealous of the exercise of power by themselves as others? In a representative republic, where the executive magistracy is carefully limited, both in the extent and duration of its power; and where the legislative power is exercised by an assembly, which is inspired by a supposed influence over the people, with an intrepid confidence in its own strength,—which is sufficiently numerous to feel all the passions which actuate the multitude, yet not so numerous as to be incapable of pursuing the objects of its passions by means which reason prescribes,—it is easy to see that the tendency to the usurpation of power is, if not constant, at least probable; *and that is against the enterprising ambition of this department that the people may well indulge all their jealousy, and exhaust all their precautions.*"

The action of the people of Ohio in the adoption of the initiative and referendum principle in their constitution is recognized in the principle of that which

Justice Story calls attention to, to-wit: the necessity for a restraint upon "the legislature," using the phrase in its restricted sense. The Federal constitution vitally recognizes the principle and necessity of checks in government. The reservation by the people of the state of part of the legislative power is the establishment of a third house. It is the very essence of a republican form of government that there should be checks in the making of laws.

The case of McPherson vs. Blacker, 146 U. S., Page 1, really supports the contention of the defendants.

The case of McPherson vs. Blacker, 146 United States, page 1, which is relied upon by the plaintiff, is authority in support of the contention of the defendant. We quote from the opinion of Mr. Chief Justice Fuller:

> "A State, in the ordinary sense of the Constitution," said Chief Justice Chase, Texas v. White, 74 U. S. 7 Wall. 700, 721 (19:227, 236), "is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed."
>
> "The State does not act by its people in their collective capacity, but through such political agencies as are duly constituted and established. The legislative power is the supreme authority except as limited by the constitution of the State, and the sovereignty of the people is exercised through their representatives in the legislature, *unless by the*

fundamental law power is elsewhere reposed. The Constitution of the United States frequently refers to the State as a political community, and also in terms to the people of the several States and the citizens of each State. What is forbidden or required to be done by a State is forbidden or required of the legislative power under state constitutions as they exist. The clause under consideration does not read that the people or the citizens shall appoint, but that "each State shall;" *and if the words "in such manner as the legislature thereof may direct" had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard."*

If the governor have a qualified negative on the acts of the legislature, surely the whole electorate have — Story on the Constitution, Section 527.

It is apparent that the Chief Justice regards the legislature of a State and the State as one, that is, when the legislature represents the supreme law-making power of the state. It is certainly not to be assumed that the legislature in prescribing the manner of holding elections in each state is doing other than making a law. In "prescribing" it is certainly exercising a legislative power. We quote again from Mr. Justice Story in his great work on the Constitution, Section 527, Volume I:

> "Thus, the governor of Massachusetts exercises a part of the legislative power, possessing a qualified negative upon all laws."

In the same section Mr. Story says:

> "Thus, until the late revision, the Constitution of New York constituted the governor, the chancellor and the judges of the supreme court, or any two of them with the governor, a council of revision which possessed a qualified negative upon all laws passed by the senate and house of representatives."

If a governor possessing a *qualified* negative upon all laws exercises a part of the legislative power, surely it cannot be successfully maintained that the whole electorate possessing, under the constitution, an *absolute* negative does not in using such negative exercise a part of the same legislative power.

The lower house represents the whole people.

Can it be said that in a matter so vital as that of the election of members of the national House of Representatives the people of the State may not have their will executed? The lower house represents the people as distinct from the state. By what token may it be claimed that the people of a State with full power to direct and control the General Assembly may not prescribe the manner of electing their own representatives when the very object of the creation of the lower house of the national legislature was to create a vital department of a national government as distinguished from a confederacy for the purpose of cementing the people direct to that national government and making them vitally interested in its welfare? So narrow a construction upon the expression, "legislature of the State"

would not be placed by the most rabid opponent of a national government as distinguished from a confederacy in the days of the strictest construction.

Fundamental error of the plaintiff.

Counsel for plaintiff, on page 16 of their brief, say:

> "The reservation (Section I, Article II) to the people of the state to reject laws passed by the legislature, can not be held to reserve to them rights they never had;"

Herein is the fundamental error of the plaintiff, an error which got him on the wrong track, and he continues to remain on that track. As said by Mr. Chief Justice Story, Section 815, Volume I, Story on the Constitution, the clause which vests in the state legislatures the power of prescribing the times, places and manner of holding elections was a surrender of power to the state government. It was part of the plan of government submitted to the states for acceptation that the states should have that power, and so far as the first clause of Section 4 of Article I of the Constitution is concerned, the Federal government surrendered everything to the state and reserved nothing to itself. Its sole reservation is in the second clause of said section.

Counsel for the plaintiff in their brief, on page 17, say:

> "Strictly speaking the prescribing required by Section 4, Article I Constitution of the United States, is not a law in the ordinary sense; especially not a law of the state; it is the discharge of a

> delegated federal duty or power, often called a Federal act, the same as if passed by Congress under the same provision of the Constitution of the United States. In the absence of that provision neither the legislature nor the people of the state would have any authority in the premises."

Herein is to be found the same fundamental error as the one just referred to which misled the plaintiff. The claim of the plaintiff as contained in the quotation leaves out of view the proposition that the first clause of Section 4 of Article I of the federal constitution left the federal government nothing to delegate. The full right of controlling elections is left entirely to the state, and the whole of the reservation to the federal government is, as stated before, in the second clause.

"Prescribing" is making a law; The Act of Congress of February 7, 1891.

In response to the claim of the plaintiff that the *prescribing* required by Section 4 of Article I of the Constitution of the United States is not a law in the ordinary sense, permit us to quote the following language from the act of Congress of February 7, 1891, (26 Statutes at Large, 735):

> "And other representatives by districts now prescribed by *law* until the legislature of such state in the manner herein prescribed shall redistrict such state."

It thus appears that the Congress referred to the result of the legislature in *prescribing* as a *law*.

No amendment to the Constitution of the United States required to authorize a referendum on a redistricting bill; Section 2 and Section 3 of Article I of the Constitution of the United States quoted.

The answer to the contention of the plaintiff that it required an amendment of the constitution of the United States to authorize the election of United States Senators by popular vote of the people of the State, and that, therefore, an amendment to the Federal constitution would be required to authorize the prescribing of the times, places and manner of holding elections for Representatives except by a legislative body consisting of a limited number of representatives is obvious upon a comparison of Section 2 and Section 3 of Article I of the Constitution of the United States.

Section 2 provides:

> "The House of Representatives shall be composed of members chosen every second year by the people of the several states."

Section 3 provides:

> "The Senate of the United States shall be composed of two Senators from each state, *chosen by the Legislature thereof,* for six years;"

The House of Representatives represents the people. The Senate represents the State.

The legislature in "prescribing the times, places and manner of holding elections for Representatives" is acting for the people, and its prescribing is a law-making power, and is to be exercised in the same man-

ner in which other laws are enacted. The legislature in "choosing Senators" acted as a body of electors exercising a power prescribed by the constitution, and not as a law-making body at all, as Mr. Justice Story observes. In exercising this power the two branches of the legislature (where the legislature was bi-cameral) generally acted concurrently and not in the manner in which such legislature acted in the enactment of laws.

Relying upon the fundamental idea that the power it left to the state through its law-making body, we have deemed it unnecessary to trouble the court with the citation of numerous decisions.

The Act of Congress (August 8, 1911) is also determinative of the question; Section 4 of the Act of Congress of August 8, 1911, quoted.

Independent of the construction to be placed upon the term "Legislature" as used in Art. I, Sec. 4 of the Federal Constitution, Congress by Section 4 of the act of August 8, 1911, providing for the present apportionment of Representatives, has determined the manner in which any re-districting must be made. This section reads as follows:

> "Sec. 4. [*Re-districting States — Representatives At-Large.*] That in case of an increase in number of Representatives in any state under this apportionment, such additional Representative or Representatives shall be elected by the state at large and the other representatives by the disricts now prescribed by law until such state *shall be re-districted in the manner provided by the laws*

thereof and in accordance with the rules enumerated in Section 3 of this act; and if there be no change in the number from a state, the Representatives thereof shall be elected from the districts now prescribed by law until such state shall be re-districted as herein prescribed."

Section 4, with the exception of the words which are above italicized: "Shall be re-districted in the manner provided by the laws thereof," is a replica of Section 4 of the apportionment act of 1901. The last named act, and the other apportionment acts for more than half a century before, contain, in lieu of the phrase quoted, the words, "By the Legislature thereof in the manner herein prescribed."

From an inspection of these acts, it is apparent that the change was advisedly made and the inference is at once raised that the changed language was adopted in view of the fact that the referendum had become a part of the constitution of many of the states.

Remarks of Senator Burton in United States Senate.

We need not, however, rest on inference. The section of the apportionment act above quoted, as it originally passed the House, contained the language of the former acts: "By the Legislature thereof."

When the bill came to the Senate, Senator Burton of Ohio (see Congressional Record, vol. 47, p. 3436) moved to amend the bill by striking out the words "By the Legislature thereof in the manner herein prescribed" and inserting, in lieu thereof, the words "In the man-

ner provided by the laws thereof, and in accordance with the rules enumerated in Section 3 of this act." In this connection, Mr. Burton said:

"This amendment pertains to the dividing of the several states into districts and to the manner in which this shall be done. * * * Section four provides that representatives shall be elected from the districts now prescribed by law until such state shall be re-districted by the Legislatures thereof in a manner herein prescribed. 'The manner herein prescribed' means that the districts shall be composed of contiguous and compact territory and contain as nearly as practicable an even number of inhabitants as expressed in the prior section." * * *

* * * "Mr. President, whatever our views may be on the subject of the initiative or referendum we cannot ignore the existence of statutes in divers States of the Union under which they are the recognized methods of enacting laws. Under such circumstances what is the effect of this expression, 'by the legislature thereof'? It is a distinct and unequivocal condemnation of any legislation by referendum or by initiative. It is a mandate to the States to this intent: 'Whatever your laws may be for the enactment of statutes, yet in the division of the State into congressional districts, you must act by the legislature alone. Even if under the laws a trivial question can be submitted to the whole electorate, nevertheless in this very important matter of dividing the State into districts the legislature alone shall have full authority.'" * * *

"A due respect to the rights, to the established methods, and to the laws of the respective States requires us to allow them to establish congressional districts in whatever way they may have provided by their constitution and by their statutes." * * *

"I call attention to the exceptional importance of a districting law. Mr. President, we all know there have been most unjust—yes, I may say, shameful, —instances of gerrymanders in some of the States." * * * "If there is anything which is clearly a distinct denial of the rights of popular government it is a gerrymander."

Here he was interrupted by Senator Shively, and a long colloquy resulted, after which Senator Burton resumed: (p. 3437)

* * * "If you have a referendum in a State the object of which is to submit to the people at large the question of whether or no a statute shall stand, the question whether it is just or unjust, that provision ought especially to apply to a law dividing a State into districts, where there is such an opportunity for monstrous injustice. *If there is any case in the whole list of laws where you should apply your referendum, it is to a districting bill.*"

"* * * *This*" (referring to amendment) "*gives to each State full authority to employ in the creation of congressional districts its own laws and regulations.*"

Mr. Burton discussed the matter at great length the following day (vol. 47, p. 3507), having this to say of infamous gerrymanders of the character of the one

now sought to be saved from the wrath of an outraged electorate:

> "As I said yesterday, there is nothing that strikes so nearly to the root of the whole system of popular government as a gerrymander. It overturns the great principle that the majority may rule, and substitutes the rule of the minority. The gerrymander gives sanction to trickery, to fraud, and to dishonesty. It gives a reward to the unscrupulous, and power to those who gain it by robbery, so that you can say of the party or the individual who accomplishes a gerrymander what Hamlet said of his uncle:
>
> 'A cutpurse of the empire and the rule,
> That from a shelf the precious diadem stole,
> And put it in his pocket.'
>
> "* * * What right have we, Mr. President, in the face of different methods and laws pertaining to the enactment of legislation—some State acting by the legislature, others acting by the legislature but subject to a referendum—to fix one inflexible way and require that every State shall be divided into congressional districts in that manner?"

Attitude of other Senators.

Other Senators then participated in the debate. Those who opposed the amendment did not undertake to contend that a re-districting law should not as a matter of right, be subject to the referendum, but maintained that the amendment was unnecessary to produce this result, and that, even without it, any re-districting

law passed by the Legislature would be subject to the referendum in states whose constitution embodied that principle. The amendment was ultimately adopted by the Senate and concurred in by the House.

It is therefore apparent, not only that the changed language was advisedly used, but that it was adopted with the express purpose and intent that, in States such as Ohio whose constitutions contained a provision subjecting all laws to the operation of the Referendum, the people might have the right to invoke a Referendum to defeat an outrageous gerrymander.

In the passage of the Act of 1911 Congress was exercising a "superintending power".

In the passage of the act in question Congress was exercising the "superintending power" vested in it by the last clause of Section 4, of Article I of the Federal Constitution.

Counsel for plaintiff contend that this power was improperly or at least imperfectly exercised, because under the language of the act, Congress does not assume to itself the entire power to determine the manner in which representatives are to be selected. They cite ex parte Siebold, 100 U. S. 371, in support of their contention. We are unable to see how they extract comfort from that case. Paragraph 8 of the syllabus to which they refer is as follows:

> "In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which

declares that "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators," Congress has a supervisory power over the subject and may either make entirely new regulations, or add to, or alter or modify the regulations made by the State."

In this connection we cite the court also to page 383 of the opinion.

Congress did not undertake to direct the legislatures of the States.

Counsel also contend that in the passage of the apportionment act Congress undertook to direct the legislatures of the States as to the manner in which the power of re-districting should be exercised, and that Congress had no power so to do. The language of the act itself is a sufficient answer to this contention. Without undertaking to determine the manner in which any re-districting law should be passed, the act provides merely that the state "shall be re-districted in the manner provided by the laws thereof."

But over and beyond all this Congress assuredly had the ultimate power, if it saw fit to exercise it, to determine how future representatives should be selected from any State for all time until a future Congress should change such method by legislative enactment. That it did not undertake to exercise this arbitrary power does not detract from the validity of the act.

The act does provide that the additional representatives provided for by the apportionment shall be elected at large and the other representatives by the districts now prescribed by law. Congress had the full power to stop there had it seen fit. By the further language of the act it does not undertake to say to any state that it shall ever redistrict such state. It merely does say (what it has the unquestioned power to say) that until such state is re-districted "in the manner prescribed by the laws thereof," representatives shall still continue to be elected at large and from the districts then existing. It was up to the respective state to determine whether or not it saw fit to re-district the state at all. Under the limitation prescribed by the act, however, if it did re-district it must take this action in the manner prescribed by its laws.

Respectfully submitted,

EDMOND H. MOORE,
TIMOTHY S. HOGAN,
Of Counsel for the Defendants.

STATE OF OHIO ON RELATION OF DAVIS *v.* HILDEBRANT, SECRETARY OF STATE OF OHIO.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 987. Submitted May 22, 1916.—Decided June 12, 1916.

Whether the guarantee of a republican form of government has been disregarded by the action of the people of a State in amending its Constitution presents no justiciable controversy, but involves the exercise by Congress of the authority vested in it by the Constitution.

Under the referendum amendment of 1912 to the constitution of Ohio, the people of that State having disapproved of the state redistricting law passed after Congress had enacted the apportionment act of 1911, and the state court having held that under the referendum amendment the legislative power was reserved in the people to be expressed by referendum *held*, that:

The decision of the highest court of the State, that under such amendment the legislative power of the State is now vested not only in the General Assembly but also in the people by referendum and that a law disapproved by the referendum was no law, is conclusive here.

Nothing in the act of Congress of August 8, 1911, 37 Stat. 13, apportioning representation among the States, prevents the people of a State from reserving a right of approval or disapproval by referendum of a state act redistricting the State for the purpose of congressional elections.

THE facts, which involve the construction and effect of the referendum amendment of 1912 to the constitution of the State of Ohio, are stated in the opinion.

Mr. Sherman J. McPherson for plaintiff in error.

Mr. Edward C. Turner, Attorney General of the State of Ohio, *Mr. Edmond H. Moore* and *Mr. Timothy S. Hogan*, for defendants in error.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

By an amendment to the constitution of Ohio adopted September 3, 1912, the legislative power was expressly declared to be vested not only in the Senate and House of Representatives of the State, constituting the General Assembly, but in the people in whom a right was reserved by way of referendum to approve or disapprove by popular vote any law enacted by the General Assembly. And by other constitutional provisions the machinery to carry out the referendum was created. Briefly they were this: Within a certain time after the enactment of a law by the Senate and House of Representatives and its approval by the Governor, upon petition of six percentum of the voters the question of whether the law should become operative was to be submitted to a vote of the people and if approved, the law should be operative, and if not approved, it should have no effect whatever.

In May, 1915, the General Assembly of Ohio passed an act redistricting the State for the purpose of congressional elections by which act twenty-two congressional districts were created in some respects differing from the previously established districts, and this act after approval by the Governor was filed in the office of the Secretary of State. The requisite number of electors under the referendum provision having petitioned for a submission of the law to a popular vote, such vote was taken and the law was disapproved. Thereupon in the Supreme Court of the State the suit before us was begun against state election officers for the purpose of procuring a mandamus directing them to disregard the vote of the people on the referendum disapproving the law and to proceed to discharge their duties as such officers in the next congressional election upon the assumption that the action by way of referendum was void and that the law which was disapproved was

subsisting and valid. The right to this relief was based upon the charge that the referendum vote was not and could not be a part of the legislative authority of the State and therefore could have no influence on the subject of the law creating congressional districts for the purpose of representation in Congress. Indeed it was in substance charged that both from the point of view of the state constitution and laws and from that of the Constitution of the United States, especially § 4 of Article I providing that "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations except as to Places of choosing Senators", and also from that of the provisions of the controlling act of Congress of August 8, 1911 (c. 5, 37 Stat. 13) apportioning representation among the States, the attempt to make the referendum a component part of the legislative authority empowered to deal with the election of members of Congress was absolutely void. The court below adversely disposed of these contentions and held that the provision as to referendum was a part of the legislative power of the State, made so by the Constitution, and that nothing in the act of Congress of 1911 or in the constitutional provision operated to the contrary and that therefore the disapproved law had no existence and was not entitled to be enforced by mandamus.

Without going into the many irrelevant points which are pressed in the argument and the various inapposite authorities cited, although we have considered them all, we think it is apparent that the whole case and every real question in it will be disposed of by looking at it from three points of view—the state power, the power of Congress, and the operation of the provision of the Constitution of the United States referred to.

1. As to the state power, we pass from its consideration,

since it is obvious that the decision below is conclusive on that subject and makes it clear that so far as the State had the power to do it, the referendum constituted a part of the state constitution and laws and was contained within the legislative power and therefore the claim that the law which was disapproved and was no law under the constitution and laws of the State was yet valid and operative, is conclusively established to be wanting in merit.

2. So far as the subject may be influenced by the power of Congress, that is, to the extent that the will of Congress has been expressed on the subject, we think the case is equally without merit. We say this because we think it is clear that Congress in 1911 in enacting the controlling law concerning the duties of the States through their legislative authority, to deal with the subject of the creation of congressional districts expressly modified the phraseology of the previous acts relating to that subject by inserting a clause plainly intended to provide that where by the state constitution and laws the referendum was treated as part of the legislative power, the power as thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. This is the case since under the act of Congress dealing with apportionment which preceded the act of 1911, by § 4 it was commanded that the existing districts in a State should continue in force "until the legislature of such State in the manner herein prescribed shall redistrict such state," (act of February 7, 1891, c. 116; 26 Stat. 735), while in the act of 1911 there was substituted a provision that the redistricting should be made by a State "in the manner provided by the laws thereof." And the legislative history of this last act leaves no room for doubt that the prior words were stricken out and the new words inserted for the express purpose, in so far as Congress had power to do

it, of excluding the possibility of making the contention as to referendum which is now urged. Cong. Rec., Vol. 47, pp. 3436, 3437, 3507.

3. To the extent that the contention urges that to include the referendum within state legislative power for the purpose of apportionment is repugnant to § 4 of Article I of the Constitution, and hence void even if sanctioned by Congress because beyond the constitutional authority of that body, and hence that it is the duty of the judicial power so to declare, we again think the contention is plainly without substance for the following reasons: It must rest upon the assumption that to include the referendum in the scope of the legislative power is to introduce a virus which destroys that power, which in effect annihilates representative government and causes a State where such condition exists to be not republican in form in violation of the guarantee of the Constitution. Const., § 4, Art. IV. But the proposition and the argument disregard the settled rule that the question of whether that guarantee of the Constitution has been disregarded presents no justiciable controversy but involves the exercise by Congress of the authority vested in it by the Constitution. *Pacific Telephone Co.* v. *Oregon*, 223 U. S. 118. In so far as the proposition challenges the power of Congress as manifested by the clause in the act of 1911 treating the referendum as a part of the legislative power for the purpose of apportionment where so ordained by the state constitutions and laws, the argument but asserts, on the one hand, that Congress had no power to do that which from the point of view of § 4 of Article I, previously considered, the Constitution expressly gave the right to do. In so far as the proposition may be considered as asserting, on the other hand, that any attempt by Congress to recognize the referendum as a part of the legislative authority of a State is obnoxious to a republican form of government as provided by § 4

of Article IV, the contention necessarily but reasserts the proposition on that subject previously adversely disposed of. And that this is the inevitable result of the contention is plainly manifest, since at best the proposition comes to the assertion that because Congress, upon whom the Constitution has conferred the exclusive authority to uphold the guarantee of a republican form of government, has done something which it is deemed is repugnant to that guarantee, therefore there was automatically created judicial authority to go beyond the limits of judicial power and in doing so to usurp congressional power on the ground that Congress had mistakenly dealt with a subject which was within its exclusive control free from judicial interference.

It is apparent from these reasons that there must either be a dismissal for want of jurisdiction because there is no power to reëxamine the state questions foreclosed by the decision below and because of the want of merit in the Federal questions relied upon, or a judgment of affirmance, it being absolutely indifferent as to the result which of the two be applied. In view, however, of the subject-matter of the controversy and the Federal characteristics which inhere in it, we are of opinion, applying the rule laid down in *Swafford* v. *Templeton*, 185 U. S. 487, the decree proper to be rendered is one of affirmance and such a decree is therefore ordered.

Affirmed.